

LEGALISING PROSTITUTION IN MALAYSIA

ABSTRACT

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**PROJEK PENYELIDIKAN BAGI MEMENUHI
SEBAHAGIAN DARIPADA SYARAT-SYARAT
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ABSTRACT

Malaysian law criminalises prostitution under the Penal Code. In spite of this, prostitution continues to thrive in Malaysia.

The aim of this project paper is to provide supportive arguments why legalising prostitution in Malaysia would be a better alternative as compared to the criminalisation approach. In this paper, prostitution is confined to commercialised sexual gratification between opposite sexes and does not include child prostitution, lesbian, gays, bisexuals and transvestites.

The paper also presents arguments on how the current legislation in Malaysia deprives the sex workers of their fundamental rights as guaranteed by the Federal Constitution and how it should be reformed in order to confer sex workers, equal legal standing just like any other legitimate profession.

In addition, it also examines the legal frameworks of the sex sector adopted by different countries namely India, Singapore, Hong Kong and Turkey in order to develop a workable legal frame work for use in the Malaysian context.

Finally, the paper delineates the challenges that would be faced to realise the proposed legal framework for Malaysia.

ABSTRAK

Undang-undang Malaysia menjadikan pelacuran sebagai suatu jenayah di bawah Kanun Keseksaan. Namun demikian, pelacuran terus berleluasa di Malaysia.

Tujuan kertas projek ini adalah untuk menghujah mengapa pengesahan pelacuran disisi undang-undang adalah alternatif terbaik berbanding dengan pendekatan untuk menjadikannya sebagai satu jenayah. Dalam kertas projek ini, pelacuran merangkumi perniagaan seks diantara jantina berlainan dan tidak melibatkan pelacuran kanak-kanak, pelacuran antara jantina serasi, biseksual dan "transvestite".

Kertas projek ini juga membentangkan hujahan bagaimana undang-undang yang sedia ada di Malaysia telah melucutkan hak-hak asasi pekerja-pekerja seks yang dijamin oleh Perlembagaan Persekutuan dan bagaimana undang-undang ini perlu diubahsuai untuk memberikan pekerja-pekerja seks kedudukan yang sama rata di sisi undang-undang sepertimana yang dinikmati oleh pekerjaan-pekerjaan lain yang sah.

Tambahan pula, kertas projek ini juga meneliti rangka kerja perundangan yang telah digunapakai oleh beberapa negara terutamanya di India, Singapura, Hong Kong dan Turki untuk membentuk satu rangka kerja perundangan yang sesuai untuk digunapakai dalam konteks Malaysia.

Akhir sekali, kertas projek ini telah menggariskan cabaran-cabaran yang akan dihadapi untuk merealisasikan cadangan rangka kerja perundangan untuk Malaysia.

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CHAPTER 1

1.0 INTRODUCTION

Prostitution has been commonly known as “the oldest profession in the world”¹ and has existed in various societies and cultures since ancient times. It is a known fact that almost all countries have a sector engaged in this activity.² However, the laws and regulations governing this sector tend to vary from country to country. In some communities it is condoned by the people whereas others consider prostitution as a serious social problem based on the perception that those involved in this profession are considered as ‘morally and physically dirty’, the lowest social class in the society, ‘deviants’, ‘damaged’ or ‘shady’ persons who are promoting ‘immoral’ and ‘perverted’ activities, contravening norms of acceptable femininity, suffering a ‘whore’ stigma³ and are most often associated with all sorts of crime to venereal diseases.

1.1 WHAT IS PROSTITUTION?

Some writers maintain that prostitution has existed ever since the institution of marriage was devised to regulated human sexual relationships and that sexual relationships resembling prostitution must have existed even before there was such a thing as marriage, but was called prostitution only after marriage was devised.⁴ Black’s Law Dictionary defines prostitution as “An act of performing, or offering or agreeing to perform a sexual act for hire. Engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other

¹ Geoffrey May, *Prostitution in The Encyclopedia of the Social Sciences*, (New York: MacMillan and Co., 1935), Henry Mayhew, *London Labour and the London Poor*, Vol.4, (New York: Dover Publications Inc.1968).

² K. Jaishankar and Debarati Halder, *Prostitution in India: Issues and Trends*.
<http://www.erces.com/journal/articles/archives/volume3/v02/v03.htm>

³ Weitzer, R, ed., *Sex for Sale: Prostitution, Pornography and the Sex industry*, (New York: Routledge, 2000).

⁴ Mabel A. Elliot and Francis E.Merril, *Social Disorganization*, (New York: Harper and Brothers, 1941).

person". The dictionary also defines a prostitute as "One who permits common indiscriminate sexual activity for hire, in distinction from sexual activity confined exclusively to one person or in other words a person who engages or agrees or offers to engage in sexual conduct with another person in return for a fee".

Other definitions include "an individual male or female who for some kind of gain, monetary or otherwise or for some form of personal satisfaction, and as a part time or whole time profession, engages in normal or abnormal sexual intercourse with various persons who may be of the same sex or opposite sex"⁵, ".....the granting of sexual access on a relatively indiscriminate basis for payment either in money or in goods",⁶ and ".....indiscriminate offer by a female of her body for intercourse or other lewdness for the purpose of gain".⁷

Although prostitution has been given numerous definitions by various writers including sociologists as well as social workers, lawyers, academicians and psychologists they do not differ greatly, in that all of them concur that prostitution has a universally accepted characteristic, namely, commercialisation of sexual gratification. Simply put, a prostitute would only grant sexual gratification if she is paid a certain amount of money for it.

However, for different groups in a society, prostitution has different meanings to them. Each group in a society interprets prostitution in accordance to their respective values and culture. To a prostitute it represents work as how other people of other occupations feel. To a religious person prostitution is an immoral act or a sin. To the legislator or government of a country, it demands legal regulation. To an academic it is an interesting social phenomenon requiring research and studies on ways to curb,

⁵ George Rylescott, *A History of Prostitution*, (Torchestream Book, 1953).

⁶ David L. Sills, ed., *The International Encyclopedia of Social Sciences*, 12 vols., (The Macmillan Co, 1958.)

⁷ Norval Morris, and Gordon Hawkins, *The Honest Politician's Guide to Crime Control*, (Chicago: University of Chicago Press, 1970).

regulate or address its problems. To the customer of the prostitute it is sexually exciting. To a migrant worker, it is an increased income for a more materialistic lifestyle together with the opportunity to enjoy night life and finally to the families who are struggling in the urban environment may find the sex sector an attractive source of income.⁸

The term prostitution has usually been referred to female prostitutes. Male prostitutes are referred to as gigolos, especially when the male prostitute is an adult.⁹ Child prostitute however refers to children¹⁰ both male and female. In this study prostitution would only be confined to sexual intercourse between opposite sex and does not include child prostitution and lesbian, gays, bisexuals and transvestites (LGBT). The term prostitutes or 'sex worker' would be used interchangeably throughout this study in this said context. The term 'sex worker' was coined by sex workers themselves to redefine commercial sex, not as the social or psychological characteristic of a class of women, but as an income-generating activity or form of employment for women and man.¹¹ Sex industry refers to the workers, managers, owners, marketers, agencies, clubs and trade associations involved in sexual commerce, both legal and illegal.

This study attempts to substantiate the reasons for legalising prostitution in Malaysia, to examine the previous, current laws and the international legal framework in regulating the sex industry in Malaysia and the types of policies existing around the world inclusive of India, Singapore, Hong Kong and Turkey in regulating the sex sector. This study also seeks to propose a model legal framework on the best policy to be adopted in Malaysia in regulating the sex sector in respect of socio-economic justice

⁸ Shyamala Nagaraj and Siti Rohani Yahya, *The Sex Sector: An Unenumerated Economy*, (Penerbit Universiti Pertanian Malaysia, 1995) at 13.

⁹ *Id.* at 2.

¹⁰ Children in Malaysia are referred to those 17 years old and below in accordance to Section 2, Age of Majority Act 1971 (Act 21).

¹¹ Lynne, J A M, *Street Prostitution as Sexual Exploitation in First Nations Women's Lives*, (Thesis submitted in partial fulfilment of Master of Social Work, University of British Columbia, 1998).

CHAPTER 2

2.0 HISTORICAL BACKGROUND

The origins of prostitution in Malaysia is difficult to ascertain as there is a lack of local research in this field to trace it, scarcity of local literature and the lack of trained and interested persons as prostitution is viewed as a deviant act. The first author to mention about the existence of prostitution in Malaysia was Abdullah bin Abdul Kadir Munshi the well-travelled teacher, who had observed during his visit to Kelantan in 1838, a few young women approaching the traders' boat during the early hours of dawn¹⁴ and he had believed them to be prostitutes due to their dressing in a sarong from the neck to the feet without a shirt, and wearing flowers from the top of their hair in a bun to the knee. Abdullah did not ask who the young women were but had viewed them as 'loose women' based on their appearance. However, physical appearance is not a definitive evidence of prostitution.¹⁵

According to historical accounts, many women were involved in prostitution during the colonial period as they were poor, forced, lured and kidnapped. J. W. W. Birch, a British resident in Perak, had stated that many escort ladies to Sultan Abdullah were engaging in prostitution with local people in the places where the Sultan visited in order to support their life as they were given little food and meagre as escort ladies.¹⁶ The British Governor in the Straits Settlement during the year 1887 to 1893, Sir Cecil Clementi Smith also noted that many attractive young females became concubines to

¹⁴Hill, A H, *The Hikayat Abdullah: An Annotated Translation* (Singapore: Malaya Publishing House, 1955).

¹⁵Supra Note 11.

¹⁶Sullivan, P, *Social Relations of Dependence in a Malay State: Nineteenth Century Perak*, Malaysian Branch of the Royal Asiatic Society, Monograph No.10,(London: Tinsley Bro,1878).

their owners and the unattractive slaves however, were forced to prostitute and part of their earnings was handed over to their owners.¹⁷

During the nineteenth century there was a great demand for foreign labour in West Malaysia due to economic opportunities. Economic growth in the rubber plantations, tin mining sectors,¹⁸ sugar, pepper, and gambier caused a large number of male labourers from China and India to be brought into those states, which resulted in a demographic imbalance between male and female in the areas concerned.¹⁹ In 1823, there was one women to every eight men in the colony and as the years passed the gap grew even larger²⁰ thus creating a situation whereby large number of the male Chinese were denied the opportunity to marry and satisfy their sexual drives within the confines of matrimony and their income as labourers did not permit them to set up families of their own.²¹ Further the fact that Chinese labourers were under the indenture system made it impossible for them to support a wife if they had arrived married in Malaya.

The situation was not very different with the Indian counterpart. In the 1870s, there was about 30,000 Indians in the country, a figure which rose to 75,000 by the late 1880s.²² In the early years, Indian workers were brought in especially for the sugar plantations and it was not conducive for wife and family under the indentured system.²³ In 1891 there were 18 Indian women to every 1000 men in Malaya and Singapore.²⁴

¹⁷ Supra Note 12.

¹⁸ Warren, J F, *Ah Ku and Karayuki-san: Prostitution in Singapore, 1870-1940*, (Singapore: Oxford University Press, 1993).

¹⁹ Lim, L L, ed., *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia*. (Geneva: International Labour Office, 1998), at 68.

²⁰ Hui, T B, "Controlling Women's Bodies: The Use of Women and Girls' Protection Legislation in Colonial Malaya (1860-1940)". *Paper presented at the Third International Malaysian Studies Conference. Universiti Kebangsaan Malaysia, Bangi. 6th -8th August 2001.*

²¹ Abdul Hadi bin Zakaria. *Some Patterns in High- Class Prostitution in Kuala Lumpur and Petaling Jaya, Masters of Arts dissertation, University Malaya, Kuala Lumpur.*

²² Arasaratnam, S, *Indians in Malaysia and Singapore*. Kuala Lumpur: (Oxford University Press, 1970).

²³ System by which thousands of Indians were transported to various colonies of European powers to provide labour for the (mainly sugar) plantations.

²⁴ Ooi, Jin-Bee, *Land, People and Economy in Malaya* (Kuala Lumpur: Longmans, 1963).

As a consequence of the wide disparity between the male and female population, prostitution gradually became rampant and subsequently a social menace. The widespread unsatisfied sexual drives were exploited by unscrupulous individuals who were out for money by providing sex for sale and thus resulting in trafficking and kidnapping of children and women for the purpose of prostitution.²⁵ Indian and Chinese labourers who had no opportunity to get married due to the financial constraints and the hardship of work associated with adjusting their lives in a foreign country made them an easy prey to the sex industry.

Many young girls from Hong Kong and China²⁶ and to a certain extent India were forced into prostitution.²⁷ The girls were often deceived into thinking they were brought here for education or for work purposes. The sex sector was linked to Chinese secret societies in the early nineteenth century²⁸ as the secret societies played an important role by providing protection to brothels. Prostitution, gambling and the control of coolie labour were the primary economic activities of the secret societies at that time and these societies fought over rights to operate prostitution dens and to import women from China.

2.1 EXTENT OF PROSTITUTION IN MALAYSIA

Comparatively little research has been done on the Malaysian sex industry. Till to date, the size of the industry is hard to estimate as much of it exists underground. Prostitution has grown alongside the national economy and has prospered secretly in hidden places without much public acknowledgement. Although prostitution is not

²⁵ Supra Note 8.

²⁶ Lai, Ah-Eng, *Peasants, Proletarians and Prostitutes: A Preliminary Investigation into the Work of Chinese Women in Colonial Malaya* (Singapore: Institute of South-East Asian Studies, Research Notes and Discussion Paper No 59, 1986).

²⁷ Supra Note 21.

²⁸ Andaya, B W and L.Y. Andaya, *A History of Malaysia*, (London: Macmillan, 1982).

illegal in Malaysia, brothel keeping, trafficking, pimping and soliciting are offences.²⁹ It is illegal to run establishments which may link clients with sex workers. As a result prostitution is an underground sex trade that is hard to monitor and control.

The most authoritative source suggests that there are between 43,000 and 142,000 sex workers in Malaysia of which 8,000 to 10,000 of them are in Kuala Lumpur.³⁰ The International Labour Organization also estimates the number of prostitutes in Malaysia during 1993 to 1994 between 43,000 and 142,000 and those involved were mainly women but there are also male, transvestite³¹ and child prostitutes.³² However, in a country where prostitutes are not registered, the exact number of prostitute would certainly be difficult to determine. Furthermore, neither research nor update had been done by academicians or the government on the current number of prostitutes prevailing in Malaysia.³³

Prostitutes in Malaysia work in highly differentiated sub sectors. At the lower end of the market are workers servicing poorer local men and a large number of low skilled international migrant workers. The sex workers may be brothel based, may work in another form of direct sex work establishment or they may be streetwalkers. Many venues provide access to sexual services such as fitness clubs, hairdressing salons, karaoke bars, coffee shops, massage parlours,³⁴ health spas, foot reflexology centres, nightclubs, restaurants,³⁵ and budget hotels. These do not operate openly and the women working in them may not admit to being sex workers. Many will not perceive themselves to be prostitutes because they service a small number of clients or do so for

²⁹ Section 372, 372A, 372B and 373 of the Penal Code (Act 574).

³⁰ Supra Note 12.

³¹ "Transvestite and 18 foreign women held for prostitution", *The Star Online*, 19 Jan.2011
<<http://thestar.com.my/news/story.asp?file=/2011/1/19/nation/7828329&sec=nation>>

³² Dr Sabitha Marican & Dr Mahmood Nazar Mohamed, Estimating the Number of Sex Workers in Malaysia, funded by World Health Organisation, 2009.

³³ Till todate no research has been made on men prostitutes as well.

³⁴ "Rubbing Residents the Wrong Way", *The Star Online*, 4 Nov.2011
<<http://thestar.com.my/metro/story.asp?file=/2011/11/15/central/9886739&sec=central>>

³⁵ "Local dolls so it as well", *The Star Online*, 26 July 2011
<<http://thestar.com.my/news/story.asp?file=/2011/7/26/sarawak/9170798&sec=sarawak>>

payment in the form of gifts. There are also those who have daytime jobs as clerks or in factories or students³⁶ selling sex on a part-time basis.

Many workers do not wish to be identified as sex workers, and because of the legal restraints upon the industry, the sex market has become very mobile and innovative.³⁷ Venues move frequently. In the upper end of the sector, clients belong to discreet networks and mobile phones are used to negotiate business. Sex acts take place in hotels or apartments and the existence of the trade is hidden from public view.³⁸

According to Abdul Hadi,³⁹ there are six main types of workers in the Malaysian sex sector using the means of procuring clients as a basis which are the market prostitute (at the lowest rung of the earnings ladder), the streetwalker⁴⁰ who advertises her services discreetly since solicitation is an offence, the employed commercial sex worker, the massage parlour, bar or nightclub workers, the freelancers and the social escorts. A recent statement by a woman owner of a spa and reflexology centre in Miri, Sarawak backs the study that street prostitutes in Malaysia continue to look for client albeit soliciting being illegal:

"You will find many more prostitutes on the streets, outside entertainment outlets and where crowds are known to gather late at night. They solicit openly, and yet people are blaming reflexology centres for secretly running vice activities".⁴¹

Today, the sex for sale industry continues to thrive in Malaysia. There is an assumption that the numbers of women in prostitution are increasing⁴² and that there is

³⁶ "Probe claims of student prostitution, ministry urges". *The Star Online*, 6 Dis. 2010
<http://thestar.com.my/news/story.asp?sec=nation&file=/2010/12/6/nation/20101206202015>

³⁷ Sex Work in Asia, July 2001, World Health Organization .

³⁸ In line with society's public rejection of prostitution.

³⁹ Supra Note 21

⁴⁰ R.S.N.Murali, "Clear Street of Prostitution," *The Star Online* 22 Dis.2011.

<http://thestar.com.my/news/story.asp?file=/2011/12/22/nation/10141477&sec=nation>

⁴¹ Supra Note 35.

⁴² More than 50 women gathered at a closed-door meeting on Sunday night in Miri to appeal to the government to seriously look into the issue of prostitution, which they claimed was "ever increasing".

2.2.2 Employment in sex-related services

Access to or employment in institution which provides quasi-sexual services or services which are peripheral to prostitution such as massage parlours, bars, hotels is a major stepping stone towards prostitution. The view that employment in sex-related services facilitates a girl's involvement in vice has been documented by Zakaria Ismail in his study of waitresses-cum-prostitutes working in bars within the municipality of the port of Penang during the period of 15th and 19th of January 1976.⁴⁹

2.2.3 Previous coital experience

Girls who are more likely to be drawn towards vice usually have had previous coital experience, which may be early in their lives or as part of a promiscuous sexual lifestyle.⁵⁰ Study done in Malaysia also supports the finding that previous sexual experience was a major factor in the development of the rationale for involvement in prostitution.⁵¹

2.2.4 High Financial Returns

The fact that vice activities in general and prostitution in particular yields high financial returns is universally acknowledged.⁵² With the possibility of earning high income through vice, there is a tendency for girls to shift to vice in general and prostitution in particular because of lucrative returns as compared to other considerations. This supports the contention of many writers that women choose to become prostitutes not so much because of poverty, but because prostitution offers an income much higher than those offered by most other occupations available to women

⁴⁹ Zakaria Ismail (1976), *Pelacuran di Bandaraya Pulau Pinang: Satu Kajian Ke Atas Pelacur-Pelacur Yang Terdiri dari Palayan Bar*, (Prostitution in Penang City: A Case Study of Bar Prostitutes), (unpublished) Graduation Exercise, Department of Malay Studies, University of Malaya, Kuala Lumpur.

⁵⁰ Worrall, Anne (1990), *Offending Women*, London: Routledge.

⁵¹ Supra Note 12

⁵² Supra Note 44

with limited education.⁵³ The findings of Abdul Hadi⁵⁴ in his study is also consistent in that prostitutes came from all classes, from very poor to fairly rich indicating that the women and girls need not come from a poor family to be driven into prostitution. Thus Kate Millet⁵⁵ argues that it could never be possible to eliminate the economic factor motivating women to prostitution because for most prostitutes, “..... the choice is not between starvation and life, but it is a choice between \$5,000 and \$25,000 or between \$10,000 and \$50,000.

2.2.5 Broken homes & childhood abuse

Girls running away from home because of bad relationship with their parents⁵⁶ and from broken homes are often lured into prostitution by bad hats. This bad relationship may arise from and be manifested by either parental neglect, or physical and/or sexual abuse.⁵⁷ Childhood abuse and history of violence may also be the reason why women are driven into prostitution. A study by Z.M. Lukman⁵⁸ indicated that the incidence of childhood abuse among young women interviewed was high. Out of the 63 respondent surveyed, 82.5% reported that they were abused during childhood. Of this figure, 69% were victims of physical abuse, 80.8% of emotional abuse and 50% of sexual abuse and around 67% were found to have suffered from multiple abuse types. This finding is consistent with a recent study of 401 Malaysian women involved in prostitution from police lockups, prisons, rehabilitation centres, massage parlours,

⁵³ Murray & James, Lionel (1973), “*On the Games*,” in *New Society*, Vol. 24: 426-429.

⁵⁴ Supra Note 12.

⁵⁵ Millet, Kate (1973), “*The Prostitution Papers*,” New York: Avon Books.

⁵⁶ Supra Note 12. Of 182 girls surveyed, 125 girls or 68.7% of the sample were not enjoying a harmonious relationship with their parents.

⁵⁷ Rosenbaum, Jill Leslie (1987), “*Social Control, Gender and Delinquency: An Analysis of Drug Property and Violent Offending*,” in *Justice Quarterly*, Vol. 4: 117-132.

⁵⁸ Z.M.Lukman, *Childhood Abuse among Children Involved in Prostitution in Malaysia*, *The Social Sciences* 4 (6):567-572,2009, ISSN: 1818-5800, Medwell Journals 2009.

streets and other places.⁵⁹ This study showed that a majority or 54.1% of women had been raped more than once during their childhood.

2.2.6 Poverty

Relative, as opposed to absolute poverty pushes many women into prostitution as well. Sex workers are commonly from large families and they are poorly educated relative to average women.⁶⁰ The Committee on Elimination of Discrimination against Women, acknowledged that poverty and unemployment can force many women into prostitution and that they are “especially vulnerable to violence because of their status, which may be unlawful, tends to marginalize them.”⁶¹

2.2.7 Human Trafficking

Other reasons include the influx of human trafficking in Malaysia. Malaysia is a destination country for a significant number of women, and children who are trafficked from Indonesia, Thailand, the Philippines, Cambodia, Vietnam, Burma, China, India, Nepal, Bangladesh, and Pakistan for sexual and labour exploitation. Many victims voluntarily migrate to Malaysia to work in factories, construction and agricultural sectors, or as domestic servants, but are later coerced into debt bondage or involuntary servitude.⁶² The Malaysian Non-Government Organisation, Tenaganita reported that 65 per cent of the trafficking victims in Malaysia are for forced labour.⁶³ All these factors discussed above contribute very much to ensure that there is an adequate and increased amount of supply of prostitutes to the sex industry in Malaysia today.

⁵⁹ Rohany Nasir, Zainah Ahmad Zamani, Rozainee Khairuddin & Rokiah Ismail, “History of Violence among Malaysian Women involved in Prostitution,” The NIEW Journal, 2nd December, 2010.pg 45-57

⁶⁰ Nagaraj, Shyamala and Siti Rohani Yahya (1998) ‘Prostitution in Malaysia’, in Lim, L.L. *The Sex Sector: The Economic and Social Bases of Prostitution in Southeast Asia*, Geneva: International Labour Organisation p.88.

⁶¹ United Nations Committee on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/47/3B (1992).

⁶² <http://www.humantrafficking.org/countries/malaysia-2007> US Department of State, *Trafficking in Persons Report*.

⁶³ <http://www.humantrafficking.org/countries/malaysia-> Tenaganita: *New Law Targets Traffickers, Not Victims*. Referred to in ipsnews.net/news.asp?idnews=37551

3.0 LEGISLATION REGULATING THE SEX SECTOR IN MALAYSIA

Malaysian society takes the position that prostitution is a deviant act. All religions practiced in the country view prostitution negatively and argue for its legal control. The Malaysian legal system on the other hand, is based on the British system, a legacy of colonial days. The legal system reflects what can be described as the tolerationist view, which does not prohibit prostitution per se but seeks to abolish trafficking in women, brothel-keeping and pimping.⁶⁴ The legal principle is that criminal law should not interfere with the conduct of consenting adults, provided that this conduct does not threaten the legally protected interests of others. The basic philosophy for this attitude lies in the democratic ideal that a person is free to do whatever he wishes with his body, so long as any form of immorality is kept away from public view.⁶⁵ At the same time, it is the States responsibility to play a role as guardians for the young citizens who have been lured or forced into prostitution based on the doctrine of *parens patriae*.⁶⁶

Prostitution is however unlawful for Muslims under the Syariah law which covers sodomy, non-marital sexual relations and also covers circumstances where men and women are found in compromising situations or in close proximity.

⁶⁴ D'Cunha, Jean.1992. "Prostitution Laws-ideological Dimensions and Enforcement Practices," Economic and Political Weekly, April 25, pages 34-55.

⁶⁵ Abd. Hadi Zakaria, "Some Problems of the Control of Prostitution in Malaysia" A Paper presented at Bengkel Kebangsaan Kawalan Penyakit Kelamin in Hotel South East Asia, Kuala Lumpur, 13th Sept, 1980

⁶⁶ Doctrine of *parens patriae* gives the state final responsibility over all children in the country and which imposes an obligation on the state to protect their welfare. This obligation is invoked when a child's parents or lawful guardian are unable or unwilling to fulfil their parental obligations resulting in the child's welfare being threatened. The state then has the right to intervene and take measures it deems fit to safeguard the welfare of the threatened child.

3.1 EARLY REGULATION OF THE SEX SECTOR

The British authorities found it difficult to suppress the traffic in sex workers but considered it unfeasible to declare brothels illegal.⁶⁷ However, the potential threat of the spread of sexually transmitted diseases (STDs) made the British authorities introduce legislation in 1870, under the Contagious Diseases Ordinance, to register and inspect brothels as well as to provide for medical inspection and detention of diseased sex workers.⁶⁸ Under this regulation, each brothel maintained an official list stating the number of sex workers allowed, their names, age and nationalities. Workers also had a protection ticket, as part of a system that was supposed to inform them that they could turn to colonial officials in the event of ill treatment. The said ordinance was repealed in 1887 with the Women and Girls Protection Ordinance 1888 which continued with the requirement of registration of brothels but did not include medical inspection. This led to a venereal disease pandemic in the late nineteenth and the early part of the twentieth century.⁶⁹

While the Straits Settlements were⁷⁰ controlled by British law, the remaining Malay states had their own independent laws governing the sex sector.⁷¹ In Perak, legislation relating to the sex sector was in the form of Orders in Council, aimed at regulating the management of brothels and at controlling health problems and the used of young girls as prostitutes.⁷² By regulating the management of brothels, the sex industry was legal. The Orders in Council was changed by the introduction of Women and Girls Protection Order No.1 of 1895 and later replaced by the Women and Girls

⁶⁷ Supra Note 18.

⁶⁸ Supra Note 59.

⁶⁹ Supra Note 18.

⁷⁰ Malacca, Singapore and Penang.

⁷¹ Supra Note 8

⁷² Examples of the Perak Orders in Council affecting the sex sector include: No.2 of 1887: Inmates of Brothels; No.2 of 1888: Registration of Prostitutes; No.29 of 1889: Removal of Prostitutes from Brothels; No.8 of 1890: Declaration as to the Age of Prostitutes; No.5 of 1892: Abolition of brothel Registration Fees; No.9 of 1893: Management of Brothels; and No.21 of 1893: Registration of brothels, Amendment.

Protection Enactment No.7 of 1902 after Perak joined Pahang, Selangor and Negeri Sembilan to join the Federated Malay States and later replaced by the enactments of same name in 1914 and 1931.⁷³ The last two enactments contained provisions to protect women and girls, especially those who were young and forced into prostitution. Based on the said enactments, procuring, trafficking, detention in brothels against the will of any women and having carnal relations with those below the age of 15 was an offence.

Under the 1902 and 1914 enactments, a protection ticket would be given by the Protector appointed under the enactment to any prostitute found in the brothel which stated that *"whenever a prostitute has any grievances, she may come to the Protectorate, District Office or Police office and complain. Anyone daring to prevent her will be arrested and punished. These tickets are always to be kept by you on the person"*.⁷⁴ The Protector must be informed by the brothel keeper of any removal of prostitutes from the brothel or any prostitutes who quit and is also required to ensure that the protection ticket is not lost and to take any prostitute to the Protector if they wish to complain of any breach to the enactments failing which, fine or imprisonment would be imposed on the brothel keeper.

There was a gradual move towards suppression of brothels. The Protector was given the power to issue a summons to the owner of the brothel to discontinue with use of the premises for prostitution and could remove the women and girls to a safer place under his discretion. The protection of the prostitutes was possible then as operating a brothel was legal. In 1931, the protection ticket ceased to be a protection for the prostitutes as the brothels and all related activities were criminalised. As a result, the

⁷³ Supra Note 8.

⁷⁴ Ibid.

protection tickets ceased to be a form of protection for the prostitutes. Therefore in summary, the development of the sex sector can be divided into three main periods:⁷⁵

1718-1927: Brothels were allowed to operate freely and Chinese girls who wished to work as prostitutes could freely enter Malaya.

1927-1930: Brothels were still allowed to operate, but no avowed prostitute could enter.

1930 onwards: Brothels could no longer operate legally.

3.1.1 Women and Girls Protection Act ("WGPA") 1973

The Women and Girls Protection Act ("WGPA") 1973⁷⁶ came into force in April 1973. The primary object of this Act was to provide legal protection for women and girls against, and to save them from the organisation of vice. Any women and girls below the age of 21 suspected to be trained or used for immoral purposes, or if such girl frequents, or is habitually in the company of prostitutes, or brothel keepers or procurers, may be removed to the Welfare Home. This Act provided powers to the police to act against persons living on the immoral earnings of prostitution, traffickers, procurers, brothel keepers, pimps, 'mummies' and even the so-called 'boy-friends' who lure women of all ages into a life of prostitution.⁷⁷

The various offences in the Act are set in the Act⁷⁸ together with the powers of the police regarding search, seizure and arrests and arrest without warrant.⁷⁹ Most of the underage girls detained were during police raids while others were referred to the Welfare Department by their parents or guardians. This Act also covered females who are brought into the country for purposes of prostitution. Trafficking female persons was also an offence punishable by imprisonment for a term not exceeding 5 years or to a

⁷⁵ Purcell, V. 1948. *"The Chinese in Malaya"* (London, Oxford University Press).

⁷⁶ Act 106, 1973.

⁷⁷ Under the Women and Girls Protection Act, 1973, prostitution was defined as "the act of a female offering her body for promiscuous sexual intercourse for hire whether in money or in kind".

⁷⁸ Section 16, 18, 19, 20, 21 and 22 of the WGPA.

⁷⁹ Section 23 and 24 of the WGPA.

fine not exceeding RM10, 000 or both.⁸⁰ Soliciting in the public place was also an offence⁸¹ and the court was given the power to issue a warrant to search if it is suspected that any female is detained or confined in a place for illegal purposes.⁸² However, it should be noted that the said Act ceased operation upon the women marrying or attaining the age of 21. As such it could be said that the said Act did not prohibit prostitution by a woman who has reached the age of 21 years so long as she operates alone voluntarily. A prostitute would only be committing an offence if she is found soliciting in a public place.

3.1.2 The Minor Offences Ordinance 3/55

Apart from the said Act, there were other laws governing the sex sector during this period. The Minor Offences Ordinance 3/55 makes it an offence for anyone found soliciting for immoral purposes in a public place. Actions were normally taken against the prostitutes under this Act.

3.1.3 Registration of Guests Act 1965

Under the Registration of Guests Act 1965, every lodger was required to register his/her name and other particulars in the hotel register and it was mandatory for the hotel owners to ensure that all requirements under this act were followed. This law was to prevent the hotel owners from harbouring prostitutes and to prevent pimps and unscrupulous 'boy-friend' from bringing women and girls into hotels to seduce them.

3.1.4 Immigration Act 1959/63

On the other hand, foreign girls found at local hotels, massage parlours, brothels, bars, night clubs can be arrested by an Immigration or Police Officer whereby the girls may be detained in prison, police station or Immigration Department for a period not exceeding 30 days pending investigation by the Immigration followed by deportation

⁸⁰ Section 18 of the WGPA.

⁸¹ Section 22 of the WGPA.

⁸² Section 23 of the WGPA.

under the Immigration Act 1959/63⁸³. Under this Act, any prostitutes, or any person, who is living on or receiving, or who prior to entering Malaysia, lived on or received, the proceeds of prostitution are declared as prohibited immigrants.⁸⁴ It may be impossible to establish that a foreigner is a sex worker as most of them disguise themselves as tourist.

However, should these foreigners be caught by the police during anti-vice raids, they would be deported under the provisions of the Immigration Act. In addition, any person who procures or attempts to bring into Malaysia prostitutes or women or girls for the purpose of prostitution or other immoral purpose are also declared as prohibited immigrant.⁸⁵ If any prohibited immigrant as described above enters Malaysia otherwise than in accordance with a valid pass lawfully issued to him, he shall be guilty of an offence against this Act⁸⁶ and on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.⁸⁷ Any person who is convicted shall be removed from Malaysia by order of the Director General.⁸⁸ As such, the immigration law also serves as a means of controlling the sex sector in Malaysia.⁸⁹

3.1.5 Subsidiary legislation

Apart from this, all licenses of massage parlours were issued under the provisions of subsidiary legislation to control and supervise these massage parlours. In the Federal Territory, for example, The Massage Establishments (Federal Territory) By-Laws 1980, (P.U.A) 87/1980 as amended by P.U.(A) 71/1991 were made under Section

⁸³ See Section 35 of the Immigration Act 1959/63.

⁸⁴ See Section 8(3) (f) of the Immigration Act 1959/63.

⁸⁵ Section 8 (3) (f) of the Immigration Act 1959/63.

⁸⁶ Section 8 (5) of the Immigration Act 1959/63.

⁸⁷ Section 57 of the Immigration Act 1959/63.

⁸⁸ Section 32 of the Immigration Act 1959/63.

⁸⁹ Supra Note 8.

102 of the Local Government Act 1976, Act 171.⁹⁰ A license is required to operate a massage establishment⁹¹ and the license is revocable if the licensee contravenes any By-laws or breaches any condition of the license.⁹² No licensee of the massage establishment was allowed to employ any person whom he believes to be a prostitute or a person of bad character.⁹³

However, there was no standardisation with regard to the issue of license, control and supervision as this subsidiary legislation differs from town to town. The police and law enforcement agencies often found it strenuous to bring vice operators to court due to the fact that percentage of success was minimal as witnesses were afraid to testify for fear of embarrassment and social stigma. To overcome this problem, preventive laws such as the Restricted Residence Enactment Cap.39 was used to sever vice operators from their place of operation by restricting them to a different place.

3.2 CURRENT LAWS REGULATING THE SEX SECTOR

3.2.1 Penal Code (Act 574)

In 1936, the Penal Code⁹⁴ was introduced to the Federated Malay States of Negeri Sembilan, Pahang, Perak and Selangor. In 1948 the Federation of Malaya was formed which amalgamated the states of Penang, Malacca, Federated Malay States and the Unfederated Malay States, which consisted of the states of Johor, Kedah, Kelantan and Perlis. The Penal Code was then extended to the Federation of Malaya by the 1948 Penal Code Amendment Ordinance.⁹⁵ Although the states of Sabah⁹⁶ and Sarawak⁹⁷ and

⁹⁰ Supra Note 8.

⁹¹ By-law 3.

⁹² By-law 12.

⁹³ By-law 14 (1) (b).

⁹⁴ Penal Code (Cap.45, 1936)(F.M.S.)(1936 Penal Code).

⁹⁵ Penal Code (Amendment and Extended Application) Ordinance (No.32, 1948) [1948 Penal Code Amendment Ordinance].

⁹⁶ Sabah had its own penal Code (Ordinance No.3, 1959).

⁹⁷ Sarawak had its own Penal Code (Cap.57, 1934).

Singapore⁹⁸ joined Malaysia in 1963,⁹⁹ but it was only on the 22th of January 1976, that the Penal Code was extended throughout Malaysia through the 1976 Penal Code Amendment Act.¹⁰⁰ The 1936 Act was later revised in 1997 to become the present Penal Code.¹⁰¹

Prostitution has been defined under the Penal Code as the act of a person offering that person's body for sexual gratification for hire whether in money or in kind.¹⁰² Section 372 of the Penal Code forbids exploitation of any person for the purposes of prostitution. Previously before the amendment in 2001, this section was only applicable to those under the age of 21. The provision now applies generally to anyone and not only for those below the age of 21. Further, it should be noted that section 372 of the Penal Code is wide enough to cover all types of exploitation. Anyone who sells, lets for hire or otherwise disposes of, or procures, buys or hires or otherwise obtains possession of, any person with such intention that the person is to be employed or used for the purpose of prostitution or of having sexual intercourse with any other person, either within or outside Malaysia, or knowing or having reason to believe that the person will be so employed or used¹⁰³ shall be punished with imprisonment for a term which may extend to fifteen years and with whipping shall also be liable for fine.¹⁰⁴ The act of exploitation also includes anyone who under any false pretence, false representation, or fraudulent or deceitful means assists in bringing into or taking out of Malaysia any persons,¹⁰⁵ receives or harbours any person who has been sold, let for hire

⁹⁸ Singapore became independent on 9th August 1965.

⁹⁹ The Federation of Malaya was renamed Malaysia on 16 September 1963. See Malaysia Act 1963 (Act 26, 1963)(F.M.)

¹⁰⁰ See Penal code (Amendment and Extension) Act 1976 (Act A327, 1976)[1976 Penal Code Amendment Act], ss.4 and 6.

¹⁰¹ Penal Code (Act 574, 1997 Rev.Ed.Msia.) [Penal Code].

¹⁰² Section 372 (3) of the Penal Code (Act 574).

¹⁰³ Section 372 (1) (a).

¹⁰⁴ Section 372 (1)

¹⁰⁵ Section 372 (1) (b).

or who has been procured, purchased, and hired for purposes of prostitution¹⁰⁶ and wrongfully restrains¹⁰⁷ any person in any place with intention that the person will be used or employed for the purpose of prostitution.¹⁰⁸

Other acts of exploitation under the Act are by means of any advertisement or other notice published in any manner or displayed in any place for prostitution service or a service which a reasonable person would understand it to be a prostitution service, offers any person for the purpose of prostitution or seeks information for that purpose or accepts such advertisement or notice for publication or display¹⁰⁹ and where a person acts as an intermediary on behalf of another or exercises control or influence over the movements of another in such a manner as to show that the person is aiding or abetting or controlling the prostitution of that other.¹¹⁰ All acts of exploitation as mentioned above carries the same penalty. There are many cases of individuals who have been caught for exploiting persons for purposes of prostitution in Malaysia. These individuals are commonly referred to as pimps.¹¹¹ In some countries pimps include a prostitute's landlord, partner, cohabiter, or even parents though generally a pimp is someone who offers protection and business to prostitutes in exchange for a sum of money or a proportion of her/his earnings. In cases of forced prostitution, pimp is also the name given to the prostitute's exploiter.

In addition to the above, anyone who knowingly lives entirely or partly on the earnings of the prostitution of another person shall be punished with imprisonment for a term which may extend to fifteen years and with whipping, and also be liable to a fine.¹¹² Where any person is proved to have exercised control, direction or influence

¹⁰⁶ Section 372 (1) (c).

¹⁰⁷ Acts of restraining a person has been laid down in Section 372 (2) of the Penal Code.

¹⁰⁸ Section 372 (1) (d)

¹⁰⁹ Section 372 (1) (e).

¹¹⁰ Section 372 (1) (f).

¹¹¹ Often used as synonym for anyone who lives off the earnings of prostitution.

¹¹² Section 372A of the Penal Code.

over the movements of a prostitute in such a manner as to show that that person is aiding, abetting or compelling the prostitution of the prostitute with any other person or generally that person shall, in the absence of any proof to the contrary shall be deemed to be knowingly living on the earnings of prostitution.¹¹³ Soliciting for the purpose of prostitution is also illegal in Malaysia. Whoever solicits or importunes for the purpose of prostitution or any immoral purpose in any place shall be punished with imprisonment for a term not exceeding one year, or with fine, or with both.¹¹⁴ However, it is difficult to charge a person for soliciting as there are no evidence because the person who is involved will not confess that he has solicited because both parties i.e. the client and prostitute have consented.

Operating brothels are illegal in Malaysia under the Penal Code as well. The Penal Code defines 'brothel' as any place occupied or used by any two or more persons whether at the same time or at different times for purposes of prostitution.¹¹⁵ Whoever keeps, manages or assists in the management of a brothel¹¹⁶ or being the owner of any place or the agent of such owner, or being the occupier of any place, lets the place or any part thereof with the knowledge that such place or part is to be used as a brothel or permits such place or part to be used as a brothel or is wilfully a party to the continued use of such place or part as a brothel¹¹⁷ shall be punished with imprisonment which may extend to fifteen years, and shall also be liable to fine.¹¹⁸

3.2.2 Child Act 2001 (Act 611)

In 2001, the Child Act was enacted¹¹⁹ to fulfil Malaysia's obligation under the Convention on the Rights of the Child. Having ratified the convention in 1995, this was

¹¹³ Section 372A (2) of the Penal Code.

¹¹⁴ Section 372B of the Penal Code.

¹¹⁵ Section 373 (2) of the Penal Code.

¹¹⁶ Section 373 (1) (a) of the Penal Code.

¹¹⁷ Section 373 (1) (b) of the Penal Code.

¹¹⁸ Section 373 (1) of the Penal Code.

¹¹⁹ (Act 611, 2001) enforced in August 2002.

one of Malaysia's steps towards upholding the protection of rights and welfare of children. This act amalgamated three statutes, namely, the Juvenile Courts Act,¹²⁰ the Child Protection Act¹²¹ and the Women and Girls Protection Act 1973 on the basis that the Child Act covers the same age group.¹²² The Juvenile Courts Act and the Child Protection Act concerned children under the age of 18. However, the Women and Girls Protection Act was concerned with the protection of women and girls under the age of 21. As such, the protection against vice no longer apply to those between the age of 18 and 21 years with the passing of this Act. As it was important to protect this age of group as well, the legislature turned to the Penal Code not only to remedy the lacuna but also to introduce penal provisions on prostitution and vice activities.¹²³

3.2.3 Minor Offences Act (Act 336)

Sexual workers are also often charged under the Minor Offences Act 1955.¹²⁴ The specific section is on Hotels and Public Houses. It states that the keeper of any hotel, boarding-house, eating house, coffee shop or other place of public entertainment or resort who permits drunkenness or other disorderly behaviour in such house or place, or permits prostitutes or persons of notoriously bad character to meet or remain for the purpose of soliciting or misbehaving therein, shall be liable to a fine not exceeding three hundred ringgit or in a case of a second or subsequent offence to a fine not exceeding five hundred ringgit.¹²⁵ The keeper of any hotel, boarding-house, eating-house, coffee shop or other place of public entertainment or resort shall also be liable to the same punishment for every similar act, omission, neglect or default of any agent or servant employed by him in the course of his business. Any agent or servant of the keeper shall

¹²⁰ (Act 90, 1947)

¹²¹ (Act 468, 1991)

¹²² Norbani Mohamed Nazeri, "Criminal law Codification and Reform in Malaysia: An Overview", Singapore Journal of Legal Studies, [2010] 375-399.

¹²³ Malaysia, Parliamentary Debates, vol.3, col.43 at 80 (9 August 2001) (Datuk Seri Utama Dr, Rais bin Yatim).

¹²⁴ Act 336, 1955.

¹²⁵ Section 18 (1) of the Minor Offences Act 1955.

also be liable to the same punishment as if he or she had been the keeper of such place.¹²⁶

Any person who is found drunk and incapable of taking care of himself, or is guilty of any riotous, disorderly or indecent behaviour, or of persistently soliciting or imputing for immoral purposes in any public road or in any public place or place of public amusement or resort, or in the immediate vicinity of any Court or of any public office or police station or place of worship, shall be liable to a fine not exceeding twenty-five ringgit or to imprisonment for a term not exceeding fourteen days, and on a subsequent conviction to a fine not exceeding one hundred ringgit or to imprisonment for a term not exceeding three months or both.¹²⁷ Other disorderly conduct includes prostitute behaving in a disorderly or indecent manner in or near any public road¹²⁸ or in any place of public resort¹²⁹ shall be liable to a fine not exceeding RM100 or to imprisonment for a term not exceeding one month.¹³⁰ Hotels are also continued to be governed by the Registration of Guest Act 1965, (Revised 1989) as discussed earlier.¹³¹

3.2.4 Regulations or by-laws

In addition, city or municipal regulations or by-laws also indirectly regulates the sex industry.¹³² For instance, the current by-laws concerning massage parlours in Kuala Lumpur is the Beauty and Health Establishments (Federal Territory of Kuala Lumpur) By-laws 2003 which had effectively repealed the Massage Establishments (Federal Territory) 1980. Registration of massage parlours is a condition precedent under this by-

¹²⁶ Section 18 (2) of the Minor Offences Act 1955.

¹²⁷ Section 21 of the Minor Offences Act 1955.

¹²⁸ Section 2 defines "public road" as every road, street, bridge, passage, footway or square over which the public have a right of way and the expression "in or near any public road" includes all places in the public road and all places within ten yards of it not being effectively hidden from the road by a wall.

¹²⁹ "Place of public resort" for the purpose of this Act means any place licensed under any written law in force in Malaysia relating to theatres and includes an amusement park.

¹³⁰ Section 27 of the Minor Offences Act 1955.

¹³¹ Act 381 (Revised 1989), 1965, came into force on 01/10/1965.

¹³² V. Vasudevan and Minderjeet Kaur, "The message on massage parlours is clear: They are little more than a front for female and male prostitution", *New Straits Times*, 19 May 2006

law.¹³³ Cleanliness and hygiene is importance in maintaining a massage parlour and the infrastructure such as bathrooms, beds and the related appliances are to be kept scrupulously clean.¹³⁴ As to matters regarding personal hygiene, the proprietor is required to send his employees for a medical check-up once a year¹³⁵ and to prevent anyone from entering the premises or employing anyone whom he knows or reasonably suspects to be suffering from an infectious or communicable disease.¹³⁶ Hotels (Federal Territory of Kuala Lumpur) Act 2003¹³⁷ also requires that all hotels in the Federal Territory to have license.

3.2.5 Abduction and Criminal Intimidation of Witnesses Act (Act 191), 1947

Apart from the above, Abduction and Criminal Intimidation of Witnesses Act¹³⁸ is specifically for the abduction of any persons for the purpose of prostitution.¹³⁹ Whoever abducts any person with the intent that such person shall be held to ransom or that extortion shall be committed from that person or any other person¹⁴⁰ or knowing it to be likely that such person will be held to ransom or that extortion will be committed from that person or other person shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.¹⁴¹ Whoever commits criminal intimidation with intent to impede the course of justice¹⁴² or so that the course of justice is thereby impeded shall be punished with imprisonment which may extend to ten years and shall also be liable to fine.¹⁴³

¹³³ Section 3.

¹³⁴ Section 36

¹³⁵ Section 12

¹³⁶ Section 21 (a) & (b).

¹³⁷ Act 626.

¹³⁸ Act 191, 1947

¹³⁹ Supra Note 32.

¹⁴⁰ Section 3 (a) of the Abduction and Criminal Intimidation of Witness Act.

¹⁴¹ Section 3 (b) of the Abduction and Criminal intimidation of Witness Act.

¹⁴² Section 5 (a) of the Abduction and Criminal Intimidation of Witness Act.

¹⁴³ Section 5 (b) of the Abduction and Criminal Intimidation of Witness Act.

3.2.6 Immigration Act 1959/63

The Anti-Vice Department of the Royal Malaysian Police (PDRM) is the agency which is responsible for the cumulative statistics on the sex workers in the country which includes data from the Welfare and Social Services, Religious Department and Immigration Department.¹⁴⁴ However, this statistic is limited to those prosecuted under the present legal system. Most of the sex workers detained and arrested by PDRM are of foreign nationalities, those who enter the country illegally or by illegal means.¹⁴⁵ Most of them are charged under the Immigration Act for overstay and for not possessing a valid entry visa.¹⁴⁶ According to statistics provided by the Police statistics, local sex worker represent a small fraction of the total arrest cases. The relatively small numbers of local sex workers prosecuted in Malaysia is because it is difficult to charge the sex workers under any existing act as prostitution per se is not illegal in Malaysia and there is no law to prosecute prostitute except for laws surrounding prostitution as discussed in this chapter. The Immigration Act 1959/63 also continues to control the sex sector till to date as discussed earlier.

3.2.7 Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007

The Malaysian government had also enacted the Anti-Trafficking Persons Act 2007¹⁴⁷ to curb trafficking in persons¹⁴⁸ as Malaysia had become a destination and a transit country for men and women trafficked for the purpose of sexual exploitation and forced labour. A significant number of women from China, Indonesia, Thailand, Philippines and Vietnam are trafficked to Malaysia for commercial sexual exploitation. A small number of Malaysian women and children, primarily of Chinese

¹⁴⁴ Supra Note 32.

¹⁴⁵ Noraini Saad.(2005). Personal interview, PDRM, Bukit Aman, Kuala Lumpur.

¹⁴⁶ "Foreign GROs nabbed in Raid," *The Star Online*, 25 Nov. 2010

<<http://thestar.com.my/metro/story.asp?file=/2010/11/25/north/7495290&sec=north>>.

¹⁴⁷ Act 670. The act was passed on 24th of April 2007 and came into force on 28th of February 2008.

¹⁴⁸ "trafficking in persons" means all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act; and

ethnicity¹⁴⁹ are trafficked for sexual exploitation in Singapore, Macau, Hong Kong, Taiwan, Japan, Australia, Canada, and the United States. In 2006, there were no prosecutions of traffickers in Malaysia as the said Act was not yet in force. However, the government prosecuted 35 people for using minors for prostitution, arrested 22 individuals for procuring brothels, and 16 individuals for arranging prostitution.¹⁵⁰

Amendments were later made to the Anti-Trafficking in Persons Act 2007 as human trafficking and migrant smuggling activities became increasingly rampant. New specific sections were inserted to deal with the smuggling of migrants as well as to amend existing provisions on human trafficking. This amended act came into force on 15 November 2010 and is known as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.

Under Section 12 of this Act, any person, who traffics in persons not being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine. Any person, who traffics in persons not being a child, for the purpose of exploitation, by threat, coercion, abduction, fraud, deception, abuse of power, abuse of the position of vulnerability of a person or the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.¹⁵¹ Any person who profits from the exploitation of a trafficked person commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to a fine of not less than five hundred thousand ringgit but not exceeding one million ringgit and shall also be liable to

¹⁴⁹ 2007 US Department of State Trafficking in Persons Report.

¹⁵⁰ 2006 US Department of State Human Rights Report.

¹⁵¹ Section 13 of the said Act.

forfeiture of the profits from the offence.¹⁵² Exploitation refers to any form of sexual exploitation, forced work or services, slavery, practices similar to slavery, or any activity that contravenes the law or human organ transplants.¹⁵³ Consent of the trafficked person¹⁵⁴ and his or her past sexual behaviour¹⁵⁵ is irrelevant, inadmissible and not a defence to the offender under this act.

3.2.8 Kidnapping Act, 1961 (Act 365)

Other act which indirectly controls the sex sector includes the Kidnapping Act, 1961. Section 3 (1) of the Kidnapping Act 1961 states that whoever with the intention to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping. This act covers girls and women who are abducted and sold for ransom to pimps, agents of brothels or owners of massage parlours, bars and hotels for purposes of prostitution.

3.2.9 Anti-Money Laundering and Anti-Terrorism Financing Act 2001

The Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) that came into force on 15 January 2002 provides for the offence of money laundering, the measures to be taken for the prevention of money laundering and to provide for the forfeiture of property derived from money laundering. Section 3 (1) of the AMLATFA defines money-laundering as any act which engages directly or in directly in a transaction that involves proceeds of any unlawful activity or acquires, receives, possesses, disguises, transfers, converts, exchanges or removes from or brings into Malaysia proceeds of any unlawful activity. Accordance to the same section, "unlawful activity" means any activity which is related, directly or indirectly, to any

¹⁵² Section 15.

¹⁵³ Section 2 of the Anti-Trafficking in Persons and Anti- Smuggling of Migrants Act 2007.

¹⁵⁴ Section 16.

¹⁵⁵ Section 17.

serious offence¹⁵⁶ or any foreign serious offence. Second schedule of the said Act has laid down the offences under various Act which is deemed serious offence and includes offences under the Child Act 2001 (Act 611),¹⁵⁷ Kidnapping Act 1961 (Act 365),¹⁵⁸ and the Penal Code (Act 574).¹⁵⁹

The bottom line is that for a transaction to be deemed money laundering, the money or asset concerned must, first of all, be the subject matter of an unlawful act. Thus, money derived from crime or criminal acts which include exploitation of any person for the purposes of prostitution, living on the earnings of the prostitution of another person, soliciting for the purpose of prostitution and keeping or managing a brothel is caught under the definition of money laundering.¹⁶⁰ Money gotten pursuant to these acts and transmitted in the aftermath is clearly laundered money and any person who engages in, attempts to engage in or abets the commission of money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both.¹⁶¹ As such, AMLATFA also governs the sex sector indirectly.

3.3 INTERNATIONAL LEGAL FRAMEWORK REGULATING THE SEX SECTOR IN MALAYSIA

3.3.1 United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

There are numerous international treaties and conventions that protect the interest and human rights of sex workers today. The primary international treaty dealing

¹⁵⁶“Serious offence” means any of the offences specified in Second Schedule of AMLATFA, an attempt to commit those offences or the abetment of any of those offences.

¹⁵⁷ Offences under Section 43, 48 and 49.

¹⁵⁸ Offences under Section 3, 5 and 6.

¹⁵⁹ Offences which include Section 372, 372A, 372B and 373.

¹⁶⁰ See Second Schedule of AMLATFA.

¹⁶¹ Section 4 of AMLATFA.

with sex workers is the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.¹⁶² This convention reflects the Abolitionist¹⁶³ view to the point that it has failed adequately to recognise the human rights of sex workers and that it is based on the promise that sex work should end and that all sex workers should be regarded as victims who must be saved from themselves and be rehabilitated. Under this convention, it is an offence to procure or entice another person even with their consent into prostitution,¹⁶⁴ to exploit the prostitution of that person even with their consent,¹⁶⁵ state parties shall agree to punish any person who keeps or manages or finances a brothel¹⁶⁶ or knowingly rents or lets a building or other place for purpose of prostitution.¹⁶⁷ Malaysia has not ratified this convention thus far.

3.3.2 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children

The other international instrument on the issue is the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime¹⁶⁸ has not been ratified by Malaysia either. This Protocol criminalizes acts of receipt, transportation, harbour recruitment and transfer of persons; by means of use of force, abduction, threat of use of force, frauds, deception and abuse of position of vulnerability; for purposes of prostitution, forced labour or other forms of sexual exploitation.¹⁶⁹ The protocol is couched in language similar to the 1949 Convention and has little respect to the rights of the women in the sex sector. It fails to draw a line

¹⁶² 96 U.N.T.S.271 (1949).

¹⁶³ The Abolitionist approach declares that the institution of prostitution itself constitutes a violation of human rights, akin to the institution of slavery. The Abolitionists approach requires governments to abolish prostitution through the penalization of this 'third party' which profits from the transaction between prostitute and client. The prostitute cannot be punished, as she is the victim of a process she does not control.

¹⁶⁴ Article 1 (1), 1949 Trafficking Convention.

¹⁶⁵ Article 1 (2), 1949 Trafficking Convention.

¹⁶⁶ Article 2 (1), 1949 Trafficking Convention.

¹⁶⁷ Article 2 (2), 1949 Trafficking Convention.

¹⁶⁸ G.A.Res.55/25, U.N.G.A.O.R, 55th Session, U. N. Doc. A/RES/55/25, (2000)

¹⁶⁹ Article 3 (a),

AS16107621

between trafficking and forced prostitution and unforced prostitution, thus providing justification for criminalization and denial of basic rights of these workers.¹⁷⁰

3.3.3 Slavery Convention of 1926 and Supplementary Convention of 1956.

Other conventions relating to sex workers are the Slavery Convention of 1926¹⁷¹ and its Supplementary Convention of 1956.¹⁷² Article 1 of the Supplementary Convention covers situations of debt bondage and other forms of tied labour, under which the working conditions of sex worker may fall. Of all the conventions discussed above, only the Supplementary Convention has been ratified, approved or acceded by Malaysia. In fact, the prohibition of slavery and forced labour is a right guaranteed under Article 6 of the Federal Constitution.

3.3.4 Universal Declaration of Human Rights (UDHR)

Apart from these specific international instruments relating to the sex worker, there are general international human rights instruments that protect the sex worker. The fundamental international framework on human rights protection is the Universal Declaration of Human Rights (UDHR).¹⁷³ The preamble of the UDHR affirms equal rights and dignities of men and women, right to life and liberty,¹⁷⁴ equal protection before law and right against all forms of slavery and servitude,¹⁷⁵ protection against arbitrary interference with privacy, family, home, or correspondence¹⁷⁶ and of particular importance to the sex worker is the right to work, to free choice of employment and to just and favourable working conditions.¹⁷⁷ Other significant right includes right of each

¹⁷⁰ Laya Medhini et al, 2 "HIV/AIDS AND THE LAW" (New Delhi: Human Rights Law Network, 2007) 715.

¹⁷¹ International Convention to Suppress the Slave Trade and Slavery, 60 L.N.T.S 253, 46 Stat. 2183 (September 25, 1926).

¹⁷² Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions and Practices Similar to Slavery, 266 U.N.T.S 40 (April 30, 1956).

¹⁷³ G.A. Res 217A (III), U.N.G.O.A.R, U.N.Doc a/810, 171 (December 10, 1948).

¹⁷⁴ Article 3, UDHR.

¹⁷⁵ Article 4, UDHR.

¹⁷⁶ Article 12, UDHR.

¹⁷⁷ Article 23, UDHR.

person to a standard of living adequate to food, clothing, housing, medical care and necessary social services.¹⁷⁸

Thus the UDHR outlines a series of important rights and principles relevant to the protection of sex workers. However, the UDHR is neither a treaty nor an international agreement and as such it does not impose legal obligations on Malaysia to comply with its articles but rather a statement of principles of inalienable human rights setting up a common standard of achievement for all people and nations.

Only through the incorporation of the rights described in the UDHR into the Malaysian Constitution would it be binding on Malaysia to ascertain that the rights as enshrined in the UDHR have been complied with. A large number of provisions in the UDHR find their correspondence in the Federal Constitution (FC) of Malaysia. Article 5 of the FC is in correspondence with Article 3 and 9 of the UDHR, Article 6 of the FC is in correspondence with Article 4 of the UDHR, Article 8 of the FC is in correspondence with Article 2, 6, 7 and 23(2) of UDHR and Article 10(1)(c) of the FC is in correspondence with Article 20(2) and 23(4) of the UDHR.

In instances where there is no correspondence provision in the Federal Constitution, recourse to the courts in Malaysia has produced no relief since it has been pointed out that declaration are not binding and have no effect on national law.¹⁷⁹ Therefore, the frustration is that how effective can something which is held by the courts to be non-binding in terms of principles and which has no effect on national law be used as a measure of human rights standards of the laws of this country?

¹⁷⁸ Article 25, UDHR.

¹⁷⁹ *Merdeka University Bhd v Government of Malaysia* [1981] 2 MLJ 356, 366) and *Mohamad Ezam v KPN* [2002] 4 MLJ.

3.3.5 International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

Other international instruments that have become synonymous with the protection of basic human rights of individuals are the International Covenant on Civil and Political Rights¹⁸⁰ (ICCPR) and the Convention on the Elimination of all forms of Discrimination against Women¹⁸¹ (CEDAW). ICCPR also reflects the similar rights with emphasis on right to freedom of association that needs to be in the interests of national security, public safety, the protection of public health and morals, or the protection of rights of others¹⁸² and effective protection against discrimination to be granted.¹⁸³ Obligation of the countries to ensure that the rights under the ICCPR have been complied with is absolute and immediate. Unfortunately as of to date, the ICCPR has not been ratified by Malaysia and as the instrument is not legally binding the Malaysian government has the discretion whether to comply or not to the rights as stated in the ICCPR. CEDAW¹⁸⁴ also contains provisions that deal specifically with trafficking and prostitution¹⁸⁵ and the right of free choice of profession and employment.¹⁸⁶ Malaysia has acceded to this convention with some reservations however to date the Malaysian government has not passed an Act through Parliament to make CEDAW wholly applicable to Malaysians.¹⁸⁷

¹⁸⁰ 999 U.N.T.S 171, 6 I.L.M. 368 (December 16, 1967).

¹⁸¹ 1249 U.N.T.S. 13, 19 I.L.M. 33 (December 18, 1979).

¹⁸² Article 22 (2), ICCPR.

¹⁸³ Article 26, ICCPR.

¹⁸⁴ Ratified by Malaysia in 1995.

¹⁸⁵ Article 6, CEDAW.

¹⁸⁶ Article 11(1)(c), CEDAW.

¹⁸⁷ The doctrine of incorporation (which states that international law automatically forms part of the domestic law) is not provided for in the Federal Constitution. The doctrine of transformation provides that international law only forms part of domestic law if enacted by subsequent domestic legislation or incorporated by judicial decisions.

3.3.6 International Labour Organization (ILO)

The ILO adopted a number of conventions as well to address issues of discrimination in employment and occupation,¹⁸⁸ forced labour,¹⁸⁹ occupational safety and health¹⁹⁰ and protection of workers' health¹⁹¹ which are also of relevance to the sex worker. As these conventions have been ratified by Malaysia, the conventions are legally binding and the Malaysian government has an obligation to comply with these conventions save and except for recommendations which are non-binding guidelines.

3.3.7 United Nations' ratification of decriminalisation policies on prostitution

The United Nations has also issued a handbook containing guidelines¹⁹² to provide examples of best practices in relation to prostitution and it contains many progressive provisions of relevance to the issue of sex work and HIV. Among others, this guideline states that regulation short of criminalisation can also stigmatise the sex workers leading to human rights violations, by imposing restrictions on forced detention in rehabilitation. The handbook also criticises prostitution laws as being founded on nineteenth century notions of morality, which were as ineffective as they are now, in suppressing the industry. It recommends that an alternative approach of treating sex work as a personal service industry, which is neither condemned nor condoned and also removal of a range of offences in fear of prosecution and harassment by the police.¹⁹³

¹⁸⁸ See Discrimination (Occupation and Employment) Convention, No.111 (1958) <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

¹⁸⁹ See Forced Labour Convention, No29 (1930) <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

¹⁹⁰ See Occupational Safety and Health Convention, C155 (1981) <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

¹⁹¹ See Protection of Workers' Health Recommendation, R97 (1953) <<http://www.ilo.org/ilolex/english/recdisp1.htm>>.

¹⁹² Handbook for Legislators on HIV/AIDS, Law and Human Right: Action to Combat HIV/AIDS in view of its devastating Human, Economic and Social Impact, UNAIDS Best Practice Collection, UNAIDS/99.48E (November 1999).

¹⁹³ Ibid.

4.0 LEGALISING THE SEX SECTOR IN MALAYSIA

The very idea of legalising the sex sector is alarming to many people as they simply cannot fathom it especially the Malaysian society. There is a deep-rooted belief among the Malaysian society that prostitution has always been and will forever remain a taboo. Mention legalising prostitution to someone and you will usually see them react with disgust, laughter, incredulity or shock. There is a widespread perception among the Malaysian society that prostitution simply cannot be taken seriously or ever achieve equal status to other service occupations.

But there are several other countries where prostitution has been legalised such as Belgium, Germany and the Netherlands. Several other cities including Bangkok, Brussels, Hamburg, The Hague, Singapore and Tokyo have also well established and officially tolerated red-light districts¹⁹⁴ featuring a variety of sex businesses. As societies of the world evolve from time to time, the Malaysian society must also be open to consider policy alternatives that may be superior to the criminalisation and marginalisation approach that had been adopted thus far.

4.1 WHY THE NEED TO LEGALISE?

4.1.1 Child prostitution

Child prostitution is “the act of engaging or offering the services of a child to perform sexual acts for money or other consideration.”¹⁹⁵ Child prostitution includes juvenile prostitution, teen prostitution, youth prostitution and adolescent prostitution, as

¹⁹⁴ A red light district is defined as an area where sexually oriented businesses are clustered and does not include areas where prostitution is confined to street-level transactions.

¹⁹⁵ Kelly Schwab, *The Sexual Exploitation of Children: Suppressing the Global Demand and Domestic Options for Regulating Prostitution*, 13 Tul. J. Int'l & Comp. L. 333 2005.

long as the young woman involved in this act is below the age of 18 years old.¹⁹⁶ Youth is an essential prerequisite of sex workers throughout the world but in Asia there appears to be an even greater client demand for the very young. The premium age for sex workers in many Asian societies is between the ages of 12 and 16. At the end of 2000, there were more than a million children abused by prostitution in Asia. Although the Malaysian government purports to take an aggressive stand on child prostitution, large numbers of young women under 16 are involved in prostitution.¹⁹⁷ In the late 1970's, it is estimated that 2,000 to 8,000 young women in Malaysia below 21 years old were prostituted.¹⁹⁸ During the period of 1986 to 1990, 2,626 women and girls were rescued from brothels, bars, massage parlours and houses of prostitution, of which 50 per cent of them were under the age of 18.¹⁹⁹ Teenage schoolgirls were also involved in prostitution, tried or were forced to recruit their classmates into the sex rings and eventually managed to persuade their friends to enter the profession.²⁰⁰

Based on the statistics compiled by the Department of Social Welfare, for a five-year period from 1995 to 1999, the number of young women involved in prostitution and other vice-related activities was 4,315 cases.²⁰¹ Data from the Royal Malaysian Police shows that 1,493 young women were rescued from prostitution in the period of 1996 to 2000. The statistic given by the Royal Malaysian Police is only a rough estimation of the number of young women involved in prostitution. In Sabah, estimates ranged from a few hundred to 15,000 children born in the country to illegal immigrant

¹⁹⁶ "A child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier." Article 1 of the Convention on the Rights of the Child. The law applicable in Malaysia is the Age of Majority Act.

¹⁹⁷ Cordingley, P. and Gee, A.D.(1997). *"The Lost Children: Is there Any hope for the Hundreds of Thousands of Asian Youngsters Trapped in the Sex Trade?"*. Asiaweek, 7 (February):4-5.

¹⁹⁸ Abdul Hadi, Z. (1980). *"Pelacur dan Pelacuran di Malaysia"*. Kuala Lumpur: Utusan Publications & Distributors.

¹⁹⁹ Bruce, F. 1996. *"Children and Prostitution: 'Don't give up on me...'"* (Geneva, International Catholic Child Bureau).

²⁰⁰ Ibid.

²⁰¹ Sayed Abdul Rahman, S.M.(2000). *"Child Prostitution- The Malaysian Perspective"*. Proceeding of the Fifth National Conference on Child Abuse and Neglect: Child Protection – Current Status, Future Direction. Kuala Lumpur: Malaysian Association for the Protection of Children (MAPC). (pp.5-10).

parents, some of whom were deported. These children lacked citizenship and access to government-provided support and often resorted to menial labour, criminal activities, and prostitution to survive.²⁰² However the true figure of child prostitution in Malaysia is likely to be much higher than the official estimates given. The reasons why children are involved in prostitution have never been addressed in Malaysia.²⁰³

TABLE 1: The Number of Young Women Rescued from Prostitution by the Royal Malaysian Police

Ethnic	1991	1992	1993	1994	1995	1996	1997	1998	1999	Sep-2000
Malay	86	67	88	113	86	175	161	128	94	38
Chinese	268	124	266	175	203	152	227	231	115	72
Indian	12	6	4	7	3	3	10	7	8	8
Others	26	7	17	30	9	16	6	6	19	17
Total	392	204	375	325	301	346	404	372	236	135

Source: Royal Malaysian Police (2000)

The story about a 12 year old Indian Muslim girl who was found in a local brothel as told by Karen Radzi, an executive of IKHLAS (a drop-in centre that operates in the Chow Kit working class area of Kuala Lumpur) is also clear evidence that prostitution in Malaysia involves children as well.

"She (12-year-old Indian Muslim young woman) ended up there (in prostitution) because her father was in debt. He had decided to pay off his bills by trading in his daughter. The price for sex with her was \$20 to \$25, but she was given to clients that the more 'sought-after girls' had rejected -- the rough, bullying types. As a result, she was constantly in a lot of pain. The pimp's solution was to give her heroin. So, she's 12 years old, she's being

²⁰² U.S. Department of State, Bureau of Democracy, Human Rights and Labour, 2010 Country Reports on Human Rights Practices, report dated 8/4/2011
<<http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154391.htm>>.

²⁰³ Supra Note 13.

prostituted and she is hooked on heroin. Good God! But at least we got her out of there."²⁰⁴

Perhaps by creating legal venues for contractual sex and imposing the minimum age limit for prostitution, the demand for children may decrease as there would be no reason for prostitution to operate illegally and recruit children to cater to the demand. These measures would help ensure that adults, and not children, are prostituting by their own volition. In the event prostitution is legal in Malaysia and those who willingly enter the sex industry are provided with safe conditions and are free from controlling agents namely pimps, children would not be resorted to out of fear of contracting diseases from adult prostitutes²⁰⁵ as children are seen less likely to have contracted sexually transmitted diseases. As safer contractual-sex avenues are created, the economic incentive to infuse children into the sex trade will likely dwindle.²⁰⁶ Thus, at least one of the factors for the demand of child prostitutes would fall and in turn decrease the need for supply. Therefore, the legalisation of prostitution may likely have positive effects on ending the sexual exploitation of children.

4.1.2 Sexually Transmitted Diseases (STD)

In Malaysia, there are recorded Human Immunodeficiency Virus (HIV) infections among female sex workers and the rate has increased from 0.3 per cent in 1989 to 10 per cent in 1994.²⁰⁷ There are strong evidence linking sex workers and HIV/AIDS.²⁰⁸ In many parts of the world, sex workers have been among the groups most vulnerable to and most affected by HIV since the beginning of the AIDS pandemic.²⁰⁹ However, the incidence of HIV infections among sex workers in Malaysia

²⁰⁴ Supra Note 13.

²⁰⁵ Susan S. Kreston, "Prostituted Children: Not an Innocent Image", 34 DEC PROSECUTOR 37, 37 (2000)

²⁰⁶ Supra Note 194.

²⁰⁷ Supra Note 32 at pg 12.

²⁰⁸ Supra Note 32 at pg 22.

²⁰⁹ <http://www.who.int/hiv/topics/vct/sw_toolkit/en/>.

can be considered as a hidden population as there is no mandatory testing for sex workers. Prostitutes make up almost half of women who had tested positive as of March 31, 1994.²¹⁰ Customers of the sex sector are also vulnerable as even a single visit would have a disastrous long-term effect on them.²¹¹

In 2008, Malaysia's deputy prime minister, Tan Sri Muhyiddin bin Yassin announced that the premarital courses required for Muslims by the Federal Religious Council would include mandatory HIV screening. However, non-Muslims were encouraged to participate but it was not compulsory. He attributed the need for this screening to the rising rate of HIV infection among women. According to the then health minister, Datuk Seri Dr. Chua Soi Lek, there were approximately 3,100 new cases during the year 2008. Between the first detected case in 1986 and 2008, 84,630 men, women and children have been infected with HIV while 11,234 have died of AIDS.²¹² The Lancet article on "Prostitution, Public Health, and Human-Rights Law"²¹³ in November, 18, 2000 stated that:

"Prostitutes overwhelmingly work outside the law. This has implications for their health that are hard to quantify. In one Australian study carried out in 1998, the prevalence of sexually transmitted bacterial infections was 80 times greater in 63 illegal street prostitutes than in 753 of their legal brothel counterparts.... Legally sanctioned encouragement of prostitutes to use condoms or access screening services, both major determinants of the prevalence of sexually transmitted diseases, is impossible because of their illegal status. Occupational health and safety law is applied to prostitutes in lawful brothels but not to their counterparts on the street."

²¹⁰ Supra Note 8 at pg 120.

²¹¹ Ibid.

²¹² <http://www.unicef.org/malaysia/hiv_aids.html>.

²¹³ Bebe Loff, LLB, PhD, Head of the Human Rights and Bioethics Unit in the Department of Epidemiology and Preventive Medicine at Monash University, Beth Gaze, LLB, LLN, Associate Professor of Law at the University of Monash, and Christopher Fairley, PhD, Director of the Melbourne Sexual Health Centre.

The registration of sex workers would ensure that a minimum age for sex work is complied with and that the health and the spread of diseases such as gonococcal infections, syphilis and HIV/AIDS can be controlled. For instance, in Australia where sex work is legalised, sex workers often report lower rates of Sexually Transmitted Infections (STI) than the general Australian population.²¹⁴ In addition, Australia has the lowest rate of HIV/AIDS among sex workers in the world, and sex worker groups claim that this is due to the work of community-based sex worker organisations and projects conducted in partnership with Australia's state governments.²¹⁵

Legislation providing for the registration of sex worker can require that regular medical examinations on all sex workers are compulsory. Health education programmes can be designed specifically for the sex workers who have registered thus targeting the most endangered group. Compulsory medical examination would enable those infected with the HIV be treated accordingly and deregistered from being a sex worker so as to eliminate further infections. Currently, the existence of the sex sector underground means that there is no way of checking the health of sex workers and therefore there are no means of controlling the spread of diseases.²¹⁶ Stigma and discrimination, criminalisation, limited access to health services and information as well as exploitation and violence exacerbate this vulnerability.²¹⁷ Priscilla Alexander, co-founder of the National Task Force on Prostitution, wrote²¹⁸:

"For HIV/AIDS prevention to succeed, the conditions of risk have to change. The context – legal, social, economic – of sex work has to change, with repeal of criminal laws, access to visas and work permits, freedom of movement and association, and

²¹⁴ Saunders, Penelope. 1999, *Successful HIV/AIDS Prevention Strategies in Australia: The Role of Sex Worker Organizations*. <<http://www.scarletalliance.org.au/library/saunders99>>

²¹⁵ Commonwealth of Australia. 2005. *National HIV/AIDS Strategy: Revitalising Australia's Response 2005-2008*. Canberra: Commonwealth of Australia.

²¹⁶ Supra Note 8 at pg 41.

²¹⁷ Currier, N.R.(2003), *New Partnerships Emerging in AIDS Education: The United Nations, Governments and Sex Workers Join Hands to Confront HIV/AIDS*, United Nations Chronicle.

²¹⁸ *Research for Sex Work* article "Contextual Risk Versus Risk Behaviour," 2001.

occupational safety and health regulations, to reduce the imposition of risk from above. Until then, it will be heroic, strong individuals that can insist on safe behaviours, leaving those who are less heroic, those who are more timid and afraid, to suffer the consequences of the context of risk."

4.1.3 Human Trafficking

As discussed in Chapter 3, Malaysia is a destination, and to a lesser extent, a source and transit country for men, women, and children who are subjected to conditions of forced labour, and women and children who are subjected to sex trafficking.²¹⁹ The overwhelming majority of trafficking victims are among the two million documented and 1.9 million undocumented foreign workers in Malaysia from various countries including Indonesia, Nepal, India, Thailand, China, the Philippines, Burma, Cambodia, Bangladesh, Pakistan, and Vietnam.²²⁰ A significant number of young foreign women are recruited for work in Malaysian restaurants and hotels, some of whom migrate through the use of "Guest Relations Officer" visas, but subsequently are coerced into Malaysia's commercial sex trade.²²¹ The U.S. Department of State had recommended that the Malaysian Government enact measures to reduce the demand for both sex and labour trafficking and to expand the anti-trafficking awareness campaign to encompass both labour and sex trafficking in its 2011 Trafficking In Persons Report.

The arguments supporting the legalisation of sex work is that by giving government the power to regulate commercial sex industries and to enforce certain standards, criminal elements such as exploitation and trafficking can be eliminated.²²²

²¹⁹ <<http://www.humantrafficking.org/countries/malaysia>> .

²²⁰ Ibid

²²¹ 2011 US Department of State Trafficking in Persons Report
<<http://www.state.gov/documents/organization/164455.pdf>>

²²² Hannah Carrigg, "Prostitution Regimes in the Netherlands and Sweden: Their impact on the Trafficking of women and children in Illicit Sex Industries" <web.wm.edu/so/monitor/issues/14-1/l-carrigg.pdf>.

The Netherlands Ministry of Foreign Affairs wrote in its 2005 document "Dutch Policy on Prostitution: Questions and Answers" provided on its website:²²³

"To end abuses in the sex industry, the Netherlands decided to change the law to reflect everyday reality. It is now legal to employ prostitutes who are over the age of consent, and do the work voluntarily, but stricter measures have been introduced under criminal law to prevent exploitation.

The legalisation of brothels enables the government to exercise more control over the sex industry and counter abuses. The police conduct frequent controls of brothels and are thus in a position to pick up signs of human trafficking. This approach is in the interests of prostitutes themselves, and it facilitates action against sexual violence and abuse and human trafficking...

An important spin-off of the policy is that it prevents human trafficking, which is characterised by exploitation, coercion and violence. The lifting of the ban on brothels makes prostitution a legitimate occupation and gives prostitutes the same rights and protection as other professionals.

The labour laws offer the most effective protection against exploitation, violence and coercion. The policy is based on the conviction that strengthening the position of women is the best way to combat sexual violence. Moreover, abuses are easier to detect when prostitutes operate publicly and legally rather than in a clandestine subculture."

Legalising prostitution by itself does not eradicate human trafficking altogether. However, when prostitution is legal and regulated by the authorities, much of the regulation would be designed to control third party interference and exploitations by pimps, managers and owners of clubs or bars and include regulations for continuous monitoring of sex workers and human trafficking, thus reducing the percentage of human trafficking crime in a particular country. On October 1, 2000, Dutch law

²²³ Quoted in <<http://prostitution.procon.org/view.answers.php?questionID=001315#answer-id-007344>>.

legalised brothels and authorised local municipalities to regulate the commercial sex industries within their jurisdiction. The intention of the law was twofold which was to legalised voluntary sex work, thereby removing its social stigma and dangers, and to combat illicit practices such as involuntary prostitution and organised criminal activity, of which human trafficking is a major component.²²⁴

Although prostitution in the Netherlands is legalised, it is listed in Tier One²²⁵ of the Trafficking in Persons (TIP) Reports released by the United States Department of State, which simply means that the Netherlands is deemed to be fully compliant with the minimum standards outlined by the United States for the eradication of trafficking.²²⁶ Several other countries where prostitution is legal such as Australia, Germany and New Zealand have also consistently been found to fully comply with minimum standards for the elimination of trafficking.²²⁷

According to writers like Janice G. Raymond²²⁸ and Sheila Jeffreys,²²⁹ legalising prostitution only promotes human trafficking so as to meet its demand. However, Ronald Weitzer²³⁰ is of the opinion that this claim is fictional as studies have not demonstrated that most prostitutes have been trafficked. Further, the said writer is of the opinion that, prostitution and trafficking differ substantively as prostitution is a type of

²²⁴ Supra Note 215.

²²⁵ Countries in the annual report are rated in tiers, based on government efforts to combat trafficking.

Tier 1: Countries that do everything to meet the act's minimum standards to get rid of trafficking.

Tier 2: Countries that do not meet the minimum standards but are trying to bring themselves into compliance.

Tier 2 Watch List: Countries on Tier 2 who need special supervision because of a high or significantly increasing number of victims; failure to provide evidence of increasing efforts to combat trafficking in persons; or an assessment as Tier 2 based on commitments to take action over the next year.

Tier 3: Countries that do not meet minimum standards and do not show any effort to come into compliance. Countries in this tier are subject to potential non-humanitarian and non-trade sanctions.

²²⁶ United States, Department of State, *Trafficking in Persons Report 2007* (Washington, D.C.: Office to Combat and Monitor Trafficking in Persons, 2007), <<http://www.state.gov/g/tip/rls/tiprpt/2007>>.

²²⁷ Supra Note 219.

²²⁸ Janice G. Raymond, "10 Reasons for Not Legalizing Prostitution", <www.prostitutionresearch.com/laws/000022.html>.

²²⁹ Sheila Jeffreys, "The Legalisation of Prostitution: A failed Social Experiment", talk given at the Swedish Mission side event at the Commission on the Status of women, United Nations, New York on 5th of May, 2003.

²³⁰ Ronald Weitzer is a Professor of Sociology at George Washington University and author or editor of many books, including *Sex for Sale: Prostitution Pornography, and the Sex Industry*, Second Edition.

labour, whereas migration and trafficking involve the process of recruitment and relocation to access a market and as such it is both empirically and conceptually inappropriate to fuse the two.²³¹ It is the prohibition of prostitution that attracts organised crime and creates opportunities for large profits illegally as well as creating a need for prostitutes to look for protection and assistance. Traffickers take advantage of the illegality of commercial sex work and migration and are able to exert an undue amount of power and control over sex workers and migrants. It allows them to use the laws against prostitution to intimidate women and children. Women and girls who are held against their will are afraid to report to police for fear of being stigmatised and treated as criminals. There is overwhelming evidence that organised crime thrives under conditions in which a particular vice is criminalised, amply demonstrated by drug and alcohol prohibition and declines when it is legalised.²³²

4.1.4 Loss of revenue

No country is more famous for its commercial sex industry than the Netherlands especially its Red Light District in Amsterdam. The \$1 billion a year industry accounts for five per cent of the Dutch economy.²³³ The International Labour Organization (ILO) in its 1998 report, contends that if government gives recognition to the sex sector, it would improve the lives of between 800,000 and one million people who are paid for sexual services in the four countries of the study which are Indonesia, Malaysia, the Philippines and Thailand and that prostitution accounted for between 2 and 14% of the total economic activity in Thailand, Indonesia, Malaysia and the Philippines. This report also estimates that 0.25% to 1.5% of the total female population of the region is engaged in prostitution and that each sex job creates approximately seven other jobs.

²³¹ Ronald Weitzer, *Legalising Prostitution, From Illicit Vice to Lawful Business*, New York University Press, (New York and London, 2012), at 64.

²³² *Id* at 66.

²³³ Victor Malarek, *The Natashas: Inside the New Global Sex Trade* (New York: Arcade Publishing, 2004) at 203.

Among the millions of other workers implicated in the sex sector are business owners and managers, mamasans,²³⁴ pimps²³⁵ and procurers, cleaners, waiters, cashiers, parking valets, security guards, vendors of food, tobacco, liquor, cosmetics and clothing, stylists, property owners, travel agencies, taxi and hotel room services and even white collar professionals such as lawyers and accountants.²³⁶

Compared to other types of unskilled employment, earnings in the sex sector are higher relatively.²³⁷ For instance, in manufacturing, average wages per annum in 1990 were US\$2,852 for skilled workers and US\$1,711 per annum for unskilled workers. In comparison, a part-time sex worker in the cheapest of hotels who received US\$4 per client, seeing about ten clients daily and working only once a week for about 12 hours, earned US\$2,080 per annum.²³⁸ Therefore, the sex sector has assumed the dimensions of an industry like any other industry and has directly or indirectly contributed to employment, national income and economic growth of a country. Legalisation of prostitution would bring the sex worker and the millions of other workers implicated in the sex sector into the taxable sector of the society thus providing for equitable participation of all earners in the revenues of government. At present, as the sex sector is not legalised, the income from this sector is not taxed despite it being a lucrative sector. The revenue earned could be used for other worthy expenditure, for instance, in HIV/AIDS treatment and campaigns, providing alternative employment for women in prostitution and providing for the needy and poor citizens of the country.

²³⁴ The 'Mamasan' are those who usually look after the place where the prostitute-client engagement takes place.

²³⁵ 'Pimp' is often used as synonym for anyone who lives off the earnings of prostitution.

²³⁶ Supra Note 32 at 4.

²³⁷ *Ibid.*

²³⁸ Supra Note 32 at 5.

4.2 RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION

4.2.1 Article 5(1): Life or Personal Liberty

Part II of the Federal Constitution encompasses Articles 5 through 13 under the heading "Fundamental Liberties" which includes "Liberty of the Person". Article 5 (1) of the Federal Constitution states that: "*No person shall be deprived of his life or personal liberty save in accordance with law.*"

It was only after the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*²³⁹ that there was a realisation among the Malaysian society that the Constitution is the supreme law and that no other laws can override it.²⁴⁰ The root cause of this lack of realisation prior to this case can be traced to the Common Law traditions which we had inherited from the British.²⁴¹

Until this case, we did not realise that the Common Law approach of interpreting our laws and Constitution would hold no waters if it is in direct conflict with our Constitution. The Constitution in particular the provisions concerning fundamental liberty prevails over all other laws including the Common Law. The rights enshrined in Part II of the Constitution are to be treated with utmost sanctity.

4.2.1.1 Interpretation of Article 5(1) - Right to Livelihood

In *Tan Tek Seng*, the Court of Appeal when interpreting Articles 5 and 8 of the Constitution departed from the "traditional and doctrinaire limits" and went on to say that judges "*should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the Federal*

²³⁹ [1996] 1 MLJ 261.

²⁴⁰ Article 4(1) of the Federal Constitution.

²⁴¹ Under the British system, it is the Parliament which is supreme. Until today, the British do not have a written Constitution. As we have a written Constitution which is the supreme law of the country, elements safeguarded therein especially those provided under part II cannot be violated by any law passed by the Parliament.

Constitution. Such an objective may only be achieved if the expression 'life' in art 5(1) is given a broad and liberal meaning".

The Court of Appeal in *Tan Tek Seng* referred to two decisions of the Indian Supreme Court of which their judgments are relevant to this study.²⁴² The first of these is *Olga Tellis v Bombay Municipal Corp*,²⁴³ where Chief Justice Chandrachud said:

"For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to live conferred by art 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away from us... except according to procedure established by law. That is but one aspect of the right to life. An equal important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live... That, which alone makes it possible to live, leave aside what makes life lovable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him his life."

The second Indian case referred by the Court of Appeal which is also pertinent to this study is the case of *Delhi Transport Corp v DTC Mazdoor Congress & Ors*,²⁴⁴

²⁴² Other Indian cases on Article 21 of the Indian Constitution includes the case of *Unni Krishnan v State of A.P.* (1993) AIR SCW 863 where the court held that the right to life within the meaning of Article 21 means the right to live with human dignity and the same does not merely connote drudgery but it takes within fold 'some finer graces of human civilization, which makes life worth living'.

²⁴³ AIR 1986 SC 180, at pg 193.

²⁴⁴ [1991] Supp 1 SCC 600 at pg 717.

where Justice Satwant when delivering the majority judgment of the Supreme Court said:

"The right to life includes right to livelihood. The right to livelihood therefore cannot hang on to the fancies of individuals in authority. The employment is not a bounty from them nor can its survival be at their mercy. Income is the foundation of many fundamental rights and when work is the sole source of income, the right to work becomes as much fundamental. Fundamental rights can ill-afford to be consigned to the limbo of undefined premises and uncertain applications. That will be a mockery of them."

Adopting the approaches expressed by the Indian Supreme Court judges, Justice Gopal Sri Ram in the case of *Tan Tek Seng*²⁴⁵ reached the conclusion that the expression 'life' appearing in Article 5(1) of the Federal constitution does not refer to mere existence but incorporates all those facets that are integral part of life including those matters which go to form the quality of life. The learned judge went on to say that matters which go to form the quality of life are the right to seek and be engaged in a lawful and gainful employment and to receive those benefits that our Malaysian society has to offer to its members which encompasses right to live in a reasonably healthy and pollution free environment.

Also in the Court of Appeal case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*²⁴⁶ the expression 'life' in Article 5(1) of the Federal Constitution was held to be wide enough to encompass the right to livelihood. The foregoing view received tacit approval by the Federal Court in *R Rama Chandran v Industrial Court of Malaysia & Anor*²⁴⁷ when Edgar Joseph Jr. said:

²⁴⁵ At page 288 TTS case.

²⁴⁶ [1996] 3 AMR 3225.

²⁴⁷ [1997] 1 MLJ 145 (FC).

that each person has the right to livelihood as a fundamental right enshrined in Article 5 of the Federal Constitution. 'Livelihood' is 'means of living or sustenance.' It would be necessary for a person to provide for his living or sustenance. It is only such activity or means which is essential to earn one's living for subsistence that would constitute the right to livelihood.²⁵² Therefore this reinforces the need to legalise prostitution in order to ensure that it is viewed in the same light as any other occupation or employment that gives a person the right to earn a living or income for the sustenance of life, legally.

4.2.1.2 Interpretation of Article 5(1) - Right to Dignity

Life under Article 5(1) of the Federal Constitution has also been interpreted to include Right to dignity. In *Francis Coralie Mullin v Administrator, Union Territory of Delhi*²⁵³, the Honourable Supreme Court stated that:

"The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings".

The Court of Appeal in *Tan Tek Seng* also referred to the Indian case of *Bandhua Mukti Morcha v Union of India & Ors*,²⁵⁴ where Judge Bhagwati made the following pronouncement when considering the expression 'life' appearing in Article 21 of the Indian Constitution which is equivalent to Article 5(1) of the Federal Constitution as follows:

"It is the fundamental right of every one in the country... to live with human dignity, free from exploitation... it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities

²⁵² D.J.De, "Interpretation & Enforcement of Fundamental Rights", Eastern law House, 2000.

²⁵³ AIR 1981 SC 746

²⁵⁴ AIR 1984 SC 802, at pg 811-812

for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State – neither, the central government nor any state government – has the right to take any action which will deprive a person of the enjoyment of these basic essentials.”

Thus, the Indian Supreme Courts have interpreted Article 21 in a widest possible manner and included within its ambit the right to live with human dignity. The policy of criminalisation adopted by Malaysia forces sex workers to operate underground and behind a screen of secrecy and illegitimacy. The sex workers are unable to enjoy life just like any other regular person would as their movements are restricted and they cannot mix freely with others for fear of stigmatisation. Moreover, they are ill-treated by pimps and sadistic clients if they fail to satisfy their needs but have no avenue to channel their grouses as they fall under an illegitimate profession. Legalising prostitution would certainly accord them with dignity as they would be treated just like any other profession and enable them to enforce any rights that have been bestowed to other legal professions.

4.2.1.3 Interpretation of Article 5(1) - Right to choose a profession

In the Indian Supreme Court of *Maneka Ghandi v Union of India*²⁵⁵ Justice Bhagwati observed that the expression of ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19 of the Constitution and that Article 21 does not exclude Article 19 of the Indian Constitution. Thus, personal liberty in Article 21 which is equivalent to our Article 5(1) of the Federal Constitution was interpreted by

²⁵⁵ AIR 1978 SC 597: 1978 1 SCC 248.

the Indian Supreme Court to be wide enough to include all the freedoms mentioned in Article 19 of the Indian Constitution. One of the freedoms guaranteed by Article 19 of the Indian constitution is that all citizens shall have the right to practice any profession, or to carry any occupation, trade or business.

Personal liberty under article 5(1) of the Federal Constitution should also be interpreted to include the freedom of choice of employment although the Federal Constitution does not have an equivalent provision as Article 19 of the Indian Constitution. The sex workers must have the personal liberty to practice their profession, occupation, trade or business of their choice so long as it does no harm to the other members of the society.

4.2.1.4 Enforcement

By virtue of Section 25(2) of the Courts of Judicature Act 1964 which specifically confers a statutory right in paragraph 1 of the Schedule, sex workers can bring an action against any person or authority for the enforcement of any of the fundamental liberties protected under Part II of the Federal Constitution in the High Court. The High Court shall have power to issue directions, order, writs including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any others whichever deem fit and necessary in the particular circumstances.

4.2.1.5 Judicial Revolution

Judicial attitudes must also change. The courts in our country must begin to narrowly construe the exceptions, exclusions, limitations, reservations and restrictions contained within the Federal Constitution in order to breathe new life into the fundamental liberties as enshrined therein. Constitutional interpretation must henceforth be predicated on the basis of an ever-living, ever-speaking, ever-expanding document which has to be constantly re-interpreted in order to bear relevance to the changing

times in which we live and the greater desire for self-expression and self-determination. Just as a ray of light when passed through a prism reveals its constituent colours, so too when the provisions of our Constitution are subjected to prismatic treatment, they will reveal the several concepts that are housed within their language.²⁵⁶

In three recent decisions the Federal Court has held that the provisions of the Constitution, in particular the fundamental liberties guaranteed under Part II, must be generously interpreted and that a prismatic approach to interpretation must be adopted. These are *Badan Peguam Malaysia v. Kerajaan Malaysia*,²⁵⁷ *Lee Kwan Woh v. PP*²⁵⁸ and *Shamim Reza v. Public Prosecutor*.²⁵⁹ In short, it will take nothing less than a legal and judicial revolution to view prostitutes as “just another hard-working citizen” or a legitimate profession.

4.2.2 Article 6: Slavery and Forced Labour Prohibited

By virtue of Article 6(1) of the Federal Constitution, all forms of forced labour are prohibited, but Parliament may by law provide for compulsory service for national purposes.

Although this article explicitly guarantees that no man shall enslave or force another for self-benefit, the sex workers are continuously being exploited at the hands of pimps and third parties. In the real world due to stigmatisation and for the fear of being criminalised, sex workers, even if they have the opportunity, would refrain from seeking help to free themselves from the clutches of pimps. Hence they are forced to suffer silently.

²⁵⁶ Gan Ching Chuan, *Malaysian Administrative Law: Retrospective Analysis of Post Merdeka Development and Future Trends*, (last reviewed on 27th Feb 2010).

²⁵⁷ [2008] 1 CLJ 521.

²⁵⁸ [2009] 5 CLJ 631.

²⁵⁹ [2009] 6 CLJ 93.

Therefore, if prostitution is legalised and recognised as a legitimate work, sex workers would muster the courage to fight any enslavement as they will know the strong and long arm of the law would support them. However, at present, since they are also deemed to be a criminal in the eyes of the law, the fear of being caught by enforcement official would deter them from seeking help or escaping from being enslaved.

4.2.3 Article 8 (1): Equality and Equal Protection of Law

Equality expressed under Article 8 is the thread running through the fundamental liberties enshrined in the Federal Constitution. Article 8 (1) states that: *"All persons are equal before the law and entitled to the equal protection of the law"*. Equality expressed in Article 8(1) of the Federal Constitution is based on Article 14 of the Constitution of India which states that: *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."*

Equality before the law is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals, the others cannot invoke the jurisdiction of the High Court or the Supreme Court that the same irregularity is committed as they have been denied the benefit extended to others in an irregular manner. Equality before the law forbids class legislation, but permits reasonable classification which is founded on intelligible differentia. Intelligible differentia distinguishes persons or things that are grouped together from those and those that are left out of the group and that the differentiation must have a rational nexus to the object sought to be achieved by the statute.²⁶⁰

²⁶⁰ Supra Note 251.

‘Equal protection of law’ does not mean that the same law is applicable to all persons irrespective of difference of circumstances but that all persons similarly situated would be applied the same law alike without discrimination. In other words the concept warrants equality of treatment under equal circumstances and it means that amongst the equals the law should be equal and should be equally administered.²⁶¹

The Federal Court in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor*,²⁶² stated that:

“Article 8(1) guarantees two separate and distinct rights, namely, (a) equality before the law; and (b) equal protection of the law. It cannot be over emphasised that in accordance with well settled principles of constitutional interpretation each of these rights must be treated as a separate and distinct right despite an overlap as will be seen later in this judgment. Indeed, each right is derived from a distinctly different source. The framers of our Constitution (like the framers of the Indian Constitution) derived the equality clause from the Constitution of the Irish Free State. The equality doctrine in reality is drawn from Dicey's rule of law one of the pillars of which is that persons are equal before the law. As pointed out by Chandrachud J in Indira Nehru Ghandi v Raj Narain AIR 1975 SC 2299 at p 2470:

Dicey gave three meanings to rule of law: Absence of arbitrary power, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts and that the Constitution is not the source but the consequence of the rights of individuals, as defined and enforced by the courts. (Emphasis added.)

The framers drew the equal protection clause from the 14th Amendment to the Constitution of the United States which reads: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

²⁶¹ *Ibid.*

²⁶² [2010] 3 CLJ 507, at 522.

any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is important to note that the Constitution of the United States does not contain an equality clause. It was through the ingenuity of the Supreme Court's interpretation of the due process clause that an implied right to equality, that is to say, the right to challenge any form of state action as arbitrary, was established through case law. See Poe v Ullman 367 US 497 (1961) at p 543; Williams v Illinois 399 US 235 (1970) at p 262.

Basu in his authoritative work Commentary on the Constitution of India, (8th Ed, 2007) Vol 1, p 958 says this in respect of art 14 of the Indian Constitution: The expressions 'equality before the law' and 'equal protection of laws' do not mean the same thing, even if there may be much in common... Equality before the law is a dynamic concept having many facets. One facet -- the most commonly acknowledged -- is that there shall be no privileged person or class and none shall be above the law. Equality before the law is a positive concept and cannot be enforced in a negative manner. Where the State commits an illegality or irregularity in favour of any individual or group of individuals others cannot claim the same illegality or irregularity on the ground of a denial thereof.'

This view finds judicial support. In Asiatic Engineering Co v Achhru Ram & Ors AIR 1951 All 746, the court said: Article 14 of our Constitution lays down two things. It enacts that: The State shall not deny to any person (1) equality before the law or (2) the equal protection of the laws within the territory of India. Obviously, these two phrases have different meanings to some extent. We consider it unnecessary to discuss at length the meaning of the expression 'equality before the law,' as no point in connection with it seriously arises in the case. It appears to have been taken from the Constitution of the Irish Free State. Professor Dicey described the rule of law as one of the characteristics of the British Constitution. Of this rule of law one of the main features is, according to that great writer, 'equality before the law'.

The Federal Court when on to question as to how then is the court to say in a given case that the particular statute under challenge is compliant with the equality clause and stated that the answer lies in the following passage in the judgment of Suffian LP in the case of *Public Prosecutor v Khong Teng Khen & Anor*.²⁶³

"The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', Kedar Nath v State of West Bengal AIR 1953 SC 404 at p 406. In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a magistrate's court, others in a sessions court, and yet others in the High Court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on."

²⁶³ [1976] 2 MLJ 166.

The Federal Court applied the principles above and came to a conclusion that Section 46A of the Legal Profession Act 1976 is in compliance with the equality clause of Article 8(1). The reasons given were because:

"What s. 46A does is to classify advocates and solicitors into those who are Members of Parliament and those who are not. It classifies advocates and solicitors who hold office in a political party and those who do not. This is a reasonable classification for the purpose of permitting a member of the profession from having a say in the governance of the profession. There is an important reason of policy in support of the classification that the section makes. It is fair and just that the governance of a professional body be kept in the hands of professionals who have no other visible political interests that may create the perception that the Bar Council has political leanings."

Applying the principles as stated by the Federal Court above, the writer contends that Section 372B of the Penal Code violates the equality clause of Article 8(1). Prostitution by virtue of Article 5(1) should be accorded a legitimate employment as 'life' has been interpreted to include right to livelihood or the right to earn a living. As such, sex workers should be categorised as a class of workers and there is no other reasonable classification which can distinguish them from other members of the same class. Therefore, sex workers should be accorded the freedom to conduct their business or solicit just like any other business or profession. Thus, Section 372B of the Penal Code which restricts soliciting for the purpose of prostitution violates the equality clause of Article 8(1).

Section 372B of the Penal Code also violates the equal protection clause under Article 8(1). According to the apex court in the case of *Sivaraja*, to ascertain whether a particular legislation infringing a fundamental right is valid or not the threefold test is applicable. The legislation must (i) have an objective that is sufficiently important to justify limiting the right in question; (ii) the measures designed by the relevant state

action to meet its objective must have a rational nexus with that objective; and (iii) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

Applying the threefold test, the question to be determined here is whether Section 372B of the Penal Code is a piece of discriminatory legislation. The answer must be in the affirmative because it discriminates sex workers from soliciting while other legally accepted professions enjoy the freedom to solicit for business or livelihood. Section 372B very shrewdly criminalises solicitation for purposes of prostitution in order to eradicate the liberty of sex workers to do business or solicit legally.

The next question to ask is whether the discrimination under Section 372B is arbitrary thus violating the equal protection clause. The Court of Appeal in the case of *Tan Tek Seng* referred to the case of *Maneka Gandhi* which held that equality and arbitrariness are sworn enemies and that Article 14 of the Indian Constitution equivalent to Article 8 of the Federal Constitution ensures fairness and equality of treatment and that the principle of reasonableness is an essential element of equality or non-arbitrariness. In short, an act which is non-arbitrary must be right, just and fair.

In the context of section 372B of the Penal Code, by prohibiting the sex workers from soliciting in 'any place', the sex workers are directly prohibited from carrying out their business and as such the law is treating the sex workers unjustly and unfairly. To forbid sex workers from soliciting in any place albeit discreetly, is clearly unreasonable as this would hamper their work or trade. Such a measure is disproportionate and therefore this law is clearly arbitrary and unconstitutional. In short section 372B of the Penal Code does not satisfy the threefold test and thus violates Article 8(1) of our constitution.

Furthermore, in *Sivarasa*, the apex court was of the opinion that the appellant was not deprived of his livelihood by virtue of Section 46A of the Legal Profession Act 1976 because the appellant could still continue to earn a living as an advocate and solicitor although he is not allowed to hold any position in the Bar Council. In the context of the sex workers, if their right to solicit is deprived from them, then their livelihood would be deprived as well. As such, sex workers are clearly discriminated and accorded unfair treatment compared to other businesses and profession.

In summary, the existing laws prohibiting solicitation for the purposes of prostitution is arbitrary and discriminatory thus rendering it unconstitutional.

4.2.4 Article 10 (1) (c): Right to form Associations

Article 10 (1) (c) of the Federal Constitution provides for the right of association as follows: "*all citizens have the right to form associations*". However under Section 2 (c) the constitution has restricted this right as follows: "*on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality*".

Sex workers should also be allowed to form associations to protect themselves. For instance in Australia, Scarlet Alliance, Australian Sex Workers Association, is the national peak body of sex workers and sex workers organisation.²⁶⁴ This organisation conducts programmes on community development, health promotion, STD and HIV prevention, support sex workers who are victims of human trafficking. This organisation also provides assistance in industrial relations advocacy, financial and economic justice advocacy, housing, welfare, legal and police referrals, health and human rights policy. This organisation has been credited for sex workers occupational

²⁶⁴ Interface: a journal for and about social movements Volume 3(2): 271 - 287 (November 2011).
<www.interfacejournal.net/.../wp.../Interface-3-2-Scarlet-Alliance.pdf>

health and safety, high condom use and the lowest Sexually Transmitted Infections (STI) and HIV rates in the world.²⁶⁵

By legalising prostitution, sex workers will have the right to form an association as guaranteed by the Federal Constitution. By forming an association of their own, sex workers would certainly have an avenue to channel their problems and to help resolve any problems that may be faced by them, be it abuse or health problems from an association who understands them the most. Currently, the sex workers are not able to do so for fear of being stigmatised and their identity being known by others and as such most of their plight goes unnoticed. Furthermore, associations that cater to the needs and welfare of sex workers would help ease the burden of the government indirectly by assuming the role of an educator and mediator between the government and the sex worker in any issues that affects them. In India, there is a prostitution consultation board which is comprised of representatives of prostitutes, legal representatives and union representatives. This is the best model to date.²⁶⁶

However, the restriction²⁶⁷ of 'morality'²⁶⁸ under the Federal Constitution as stated above will be an obstacle to form an association for the sex workers. It is the writer's view that private morality should not influence the decision not to allow an association for sex worker to voice out their needs as it does not endangers public order, the safety of citizens, or causes persons to risk exploitation or corruption by others. This falls in line with the interpretation of freedom of association under the United States

²⁶⁵ *Ibid.*

²⁶⁶ Melissa Sontag, "Sex Work Explored: Rethinking the Laws Regulating Prostitution" The Georgetown Journal of Gender and the Law, Vol. VIII: 995-1016.

²⁶⁷ The Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, at 515. adopted the reasons given by the Court of Appeal in *Dr. Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19 in that provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively and that although the article says "restrictions", the word "reasonable" should be read into the provision to qualify the width of the proviso and should be read as "such reasonable restrictions".

²⁶⁸ The expression "morality" is not defined by the Constitution. However, in *Manohar v. State of Maharashtra* AIR [1984] Bom 47 it was held that morality in the equipollent Indian art. 19(2)(4): is in the nature of public morality and it must be construed to mean public morality as understood by the people as a whole.

Constitution. The Supreme Court of United States in the case of *Bryant v Zimmerman*²⁶⁹ held that state may impose restriction in the interest of public peace and safety on the right to form association. Therefore private consensual sexual activity should not come under the restriction of morality under the Federal Constitution.

There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a matured person can properly be expected to carry out for himself without the threat of punishment from the law.

5.0 REGULATING THE SEX SECTOR

Legalising sex work is just as controversial in academia as it is among the public. Three perspectives in academic writings view sex work through radically different prisms.²⁷⁰ The three are the empowerment paradigm, the oppression paradigm and the polymorphous paradigm.

The empowerment paradigm highlights the ways in which sexual services qualify as work, involve human agency, and may be potentially validating or empowering for workers.²⁷¹ This paradigm holds that there is nothing that can prevent sex workers from operating for the mutual gain of all parties involved just like other employments. Empowerment theorists argue that problems relating to sex workers are due to its criminalisation and not the sex work by itself and are of the opinion that alternatives to criminalisation may improve a sex workers socio-economic status and thus allow them to have control over their working conditions.

The oppression paradigm is supported by a number of academics as well as anti-prostitution activists and it is grounded on radical feminism. According to this paradigm, prostitution exists because of inequalities between men and women and that women would not sell sex if they had the same socio-economic opportunities as men. Furthermore, prostitution only exploits and victimises women to the benefit of men.

The polymorphous paradigm is about identifying the negative and the positive part of prostitution and coming up with a policy which best suits a particular country.

These paradigms are the reason why there are many types of policies regulating the sex sector around the world today.

²⁷⁰ Supra Note 230 at 7-21

²⁷¹ *Ibid.*

5.1 TYPES OF POLICIES

5.1.1 Criminalisation

Criminalisation makes prostitution illegal with related offences which can be seen in the criminal code of a particular country. Criminalisation seeks to reduce or eliminate the sex industry and is supported by those who are opposed to prostitution on moral, religious or feminist grounds.²⁷² Jurisdictions that have criminalised prostitution can be divided into two groups:

- i) Prohibitionist approach where all forms of prostitution are unacceptable and therefore illegal. This is the approach has been taken by most of the states in the United States and countries in the Middle East.
- ii) Abolitionist approach is a modified form of prohibition which allows the sale of sex, but all other related activities are illegal that comprises of soliciting, living off the earnings of prostitution, establishment of brothels, and procurement.

Making these related activities illegal effectively criminalises prostitution as it is virtually impossible to carry out prostitution without contravening one law or another.²⁷³ An abolitionist approach often focuses on eliminating or reducing the negative impacts of prostitution. This approach is currently adopted by Malaysia, England, and Canada.

In jurisdictions which criminalise prostitution in this approach, confusion arises as to its legal status due to a tolerant climate practiced amongst its people. In such jurisdiction, prostitution is known to exist, in spite of raids on sex dens and arrests being

²⁷² Gangoli, G., & Westmarland, N. (2006). *International approaches to prostitution: Law and policy in Europe and Asia*. (London: The Policy Press).

²⁷³ West, J. (2000). *Prostitution: collectives and politics of regulation*. *Gender, Work and Organization*, 7(2), 106–118.

carried out by law enforcement agencies, but prosecutions are rarely effected. This is most common in abolitionist regimes.

Sweden on the other hand adopted a different approach in criminalising prostitution. It was the first country to criminalise the buyers of sex rather than sex workers themselves as it viewed prostitution as a sexual abuse and an act of violence against women. Proponents of the Swedish legal system hoped that by doing this, they can gradually curb and eventually eradicate prostitution by diminishing the demand for paid sex.

5.1.2 Decriminalisation

Decriminalisation is where there has been repeal of all laws against prostitution, or the removal of provisions that criminalises all aspects of prostitution.²⁷⁴ In decriminalisation, it is also equally important to know how the sex workers are procured. In this respect, sex workers can be procured in two major ways (i) voluntary prostitution and (ii) that involving either by force or/and coercion and child prostitution. The latter must remain a criminal offence regardless if prostitution is decriminalise or legalised. The key difference between legalisation and decriminalisation is that with the latter there are no prostitution related regulations or laws imposed by a particular state or country either to govern regulate and administer the industry. Simply put, in decriminalising prostitution, since there are not laws to say that it is criminal offence to prostitute oneself then it is legal to do so as long as it does not contravene any other statutes of the land.

Any regulation of the industry is predominantly through the existing statutes and regulations which apply to all employment equally. Thus prostitution is recognised as a legitimate business and comes under conventional occupation and health regulations

²⁷⁴ <prostitution.procon.org/sourcefiles/newzealandreport.pdf>.

and is subject to standard local council business and planning controls. Those involved in prostitution have the same rights and responsibilities as other workers including a duty to pay tax. It is pertinent to note that the aims of decriminalisation are different from legalisation. The main objective of legalisation is to protect social order. While this is relevant to decriminalisation, the main emphasis here is on the sex worker, their rights, and improving their health, safety and working conditions.

Proponents of decriminalisation argue that the cost of keeping prostitution illegal largely outweighs the gains, and that prostitution should essentially be seen as consenting behaviour between adults.²⁷⁵ They also argue the injustice of a double standard whereby a sex worker can be found guilty of an offence, but not the client who is typically male. They also point to potential violation of civil liberties that state-regulated legalisation might involve, through controls such as registration and mandatory health checks.²⁷⁶

In decriminalised regimes, there is typically a shift in power away from the state and clients to sex workers themselves. Decriminalisation is also recognised as a way of avoiding the two-tier reality of legal and illegal operations, with the latter operating underground. Decriminalisation also aims to remove the social exclusion which makes sex workers vulnerable to exploitation and difficult for them to move out of the industry. Currently, only New South Wales (Australia) and New Zealand have adopted a legal framework based on decriminalisation.

²⁷⁵ Jordan, J. (2005). *The Sex Industry in New Zealand: a literature review*. Wellington: Ministry of Justice. <prostitution.procon.org/sourcefiles/newzealandreport.pdf>.

²⁷⁶ Central and Eastern European Harm Reduction Network. (2005). *Sex Work, HIV/AIDS, and Human Rights*. Vilnius, Lithuania: Central and Eastern European Harm Reduction Network. <prostitution.procon.org/sourcefiles/newzealandreport.pdf>.

5.1.3 Legalisation

Legalisation is where prostitution is controlled by government and is legal only under certain state-specified conditions. Legalisation is also sometimes referred to as regulation by some authors or academicians. The underlying premise in legalised regimes is that prostitution is necessary for a stable social order but subjected to controls to protect public order and health.²⁷⁷ Some jurisdictions prefer legalisation as a means to reduce negative elements associated with prostitution such as organised crimes, sex trafficking, police corruption, child prostitution, and to control STDs.

Key indicators of a legalised system are the existence of controls and conditions by a particular state or government. These can include establishing red-light districts, controlling public solicitation, licensing individual workers, registration, and mandatory health checks, periodically inspecting legal establishments managed by police, local authorities, or independent specialist boards. Businesses or sex workers without the necessary pre-requisites and permits are subjected to criminal penalties. Because legalisation involves regulation, citizens are more inclined to support this regime than decriminalisation. Prostitution has been legalised in countries such as the Netherlands, Germany, Iceland, Switzerland, Austria, Denmark, Greece, Turkey, Senegal, the USA state of Nevada, and many Australian states which are Victoria, Queensland, Australian Capital Territory and Northern Territory.

5.1.4 Unregulated regimes

Finally, there are some jurisdictions where prostitution is entirely unregulated which means that there are no laws either prohibiting or allowing prostitution. A review of 27 countries in Central and Eastern Europe and Central Asia found this was the case

²⁷⁷ Supra Note 274.

in eleven of them. They included Azerbaijan, Bulgaria, the Czech Republic, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Poland, Slovakia, Slovenia and Tajikistan.²⁷⁸

5.2 LEGAL FRAMEWORK OF THE SEX SECTOR IN SELECTED COUNTRIES

5.2.1 India

Prostitution in India is a USD 8 billion annual business and thirty per cent of the sex workers are children whose exploiters earn a whopping USD 2.2 billion.²⁷⁹ According to a survey, there are approximately 10 million sex workers in India out of which 100,000 are in Mumbai alone, Asia's largest sex industry centre.²⁸⁰ There are about 300,000 to 500,000 children in the sex trade in India²⁸¹ among which Bangalore along with five major cities together account for 80% of child prostitutes in the country.²⁸²

Sex work in India is governed by laws entailed in the Constitution of India, the Indian Penal Code, 1860 and the Immoral Traffic (Prevention) Act, 1956 (ITPA). The Constitution apart from the equality provisions²⁸³ and provisions of freedom of

²⁷⁸ Supra Note 275.

²⁷⁹ S.Sridevi Goel, *Girl Child Prostitution, Society's Responsibility – Indian Scenario*, 7 CBI BULLETIN 14 (1999). Referred in Dharmendra Chatur. 2009. "Legalization of Prostitution in India" The Selected Works of Dharmendra Chatur, <<http://works.bepress.com/dchatur/1>>.

²⁸⁰ Robert I. Freidman, *India's Shame: Sexual Slavery and Political Corruption Are Leading to An AIDS Catastrophe*, The Nation, April 8, 1996 c.f. Donna M. Hughes et al, *Factbook on Global Sexual Exploitation*, Coalition Against Trafficking in Women (CATW), <<http://www.catwinternational.org/factbook/india.php>>

²⁸¹ Donna M. Hughes et al, *Factbook on Global Sexual Exploitation*, Coalition Against Trafficking in Women (CATW), <<http://www.catwinternational.org/factbook/india.php>>.

²⁸² Supra Note 283.

²⁸³ The equality provisions are Article 14 and 15 in Part III dealing with Fundamental Rights of the Constitution of India, 1950. Article 14 provides for equality before the law and equal protection of the laws.

association,²⁸⁴ right to life and personal liberty,²⁸⁵ guarantees prohibition of trafficking of human beings and forced labour.²⁸⁶

Under part IV of Directive Principles of State Policy, the State is required to direct its policies towards securing that both men and women have an equal right to an adequate means of livelihood,²⁸⁷ that health and strength of workers not be abused, and that citizens are not forced by necessity to enter avocations unsuited for their age and strength,²⁸⁸ promotion of the educational and economic interests of weaker sections of the society, ensuring their protection from social injustice and exploitation,²⁸⁹ requirement of fostering respect for international law and treaty obligations,²⁹⁰ obligation on the state to raise the levels of standard of living²⁹¹ and the renunciation of practices by citizens that are derogatory to the dignity of women.²⁹² The Andhra Pradesh High Court has also affirmed that these combined duties are placed on the state and a corresponding right is placed on citizens including sex workers.²⁹³

The main statute in regards to sex work in India is the Immoral Trafficking Prevention Act, 1956 (ITPA). The ITPA does not criminalise prostitution or prostitutes per se, but mostly punishes acts by third parties like pimping, brothel keeping, persons living on earnings of prostitutes and other activities punishable, which gives a commercial aspect to prostitution that is likely to exploit the prostitute.²⁹⁴ Section 3 of the ITPA provides for the punishment of any person in charge of the premises who uses or knowingly allows someone else to use it as a brothel. In a couple of court judgments

²⁸⁴ Article 19(1), Constitution of India, 1950.

²⁸⁵ Article 21, Constitution of India, 1950.

²⁸⁶ Article 23, Constitution of India, 1950

²⁸⁷ Article 39(a), Constitution of India, 1950

²⁸⁸ Article 39(e), Constitution of India, 1950

²⁸⁹ Article 46, Constitution of India, 1950.

²⁹⁰ Article 51, Constitution of India, 1950.

²⁹¹ Article 47, Constitution of India, 1950.

²⁹² Article 51 A(e), Constitution of India, 1950.

²⁹³ *P.N.Swamy, Labour Liberation front, Mahaboobnagar v Station House Officer*. Hyderabad 1998 (1) ALD 755.

²⁹⁴ Manoj Wad and Sharayu Yadav, *The Legal framework of prostitution in India, Prostitution and beyond: an Analysis of Sex Work in India* (New Delhi: SAGE Publishers, 2008) at 212.

it was held that the ITPA did not aim to abolish prostitutes and prostitution or make it a criminal offence for a woman to prostitute herself, but was rather intended to inhibit or abolish the commercialised vice of trafficking in women.²⁹⁵

Despite the wide definitions given by the Supreme Courts of India as to the interpretation of 'life' under Article 21 of the Constitution of India, the Gujarat High Court in the case of *Sahyog Mahila Mandal v State of Gujarat*²⁹⁶ refused to recognise prostitution as a legitimate means of livelihood based on the reasons that it would increase the cases of women being trafficked and also that the right to prostitution is not a fundamental right of women or girls.

A move to amend the law and make soliciting a non-criminal offence was initiated in 2006 by way of the Immoral Traffic Prevention Amendment Bill, 2006 which has since lapsed.²⁹⁷ "The Bill wasn't clear on whether the government wanted to legalise or decriminalise the profession," says Kaushiki Sanyal, senior analyst, PRS Legislative Research, a Delhi-based body that provides research support on legislative and policy issues.²⁹⁸

The Immoral Traffic (Prevention) Amendment Bill, 2006 proposes to amend the ITPA to combat trafficking and sexual exploitation for commercial purposes. The Bill defines "prostitution" as sexual exploitation or abuse of persons for commercial purposes and a "brothel" as any house or place which is used for purposes of sexual exploitation for the gain of another person or for the mutual gain of two or more prostitutes.

²⁹⁵ As stated in the cases of *In Re: Ratnamala and Another v Respondent* AIR 1962 Madras 31, *Bai Shanta v State of Gujarat* AIR 1967 Gujarat 211 and *Gaurav Jain v Union of India and others* AIR 1997 SC 3021.

²⁹⁶ [2004] 2 GLR 1764.

²⁹⁷ <http://www.telegraphindia.com/1091230/jsp/opinion/story_11923256.jsp>.

²⁹⁸ Supra Note 302.

The Bill proposes to delete the provisions that penalised prostitutes for soliciting clients²⁹⁹. It penalises any person visiting a brothel for the purpose of sexual exploitation of trafficked victims.³⁰⁰ The term "trafficking in persons" has been defined with a provision for punishing any person who is guilty of the offence of trafficking in persons for the purpose of prostitution. Although the Bill does not penalise an individual if he is in prostitution for his own profit, it penalises prostitution if carried on in a brothel or from any public place within 200 metres of an educational institution, place of religious worship, hotel, hospital, nursing home or any public place notified by the Commissioner of Police or Magistrate. Such clauses, while literally not prohibiting prostitution, make it almost impossible for a person to operate as a prostitute.

Further, the Bill is silent on whether prostitution ought to be a legitimate way of earning a living if the person enters or stays in the profession out of his own accord. The bill has been criticised because it penalises clients who visit prostitutes which may drive this sector underground, preventing legal channels of support to victims of trafficking,³⁰¹ thus defeating the purpose for which it was amended in the first place. However, this bill has encountered considerable opposition for the reasons stated above and has not come into force.

Recent development in India comes in a significant remark by the Supreme Court on the 10th of December, 2009, comprising of Justices Dalveer Bhandari and A.K. Patnaik, who had sought the Government's stance on whether it can legalise prostitution if it is not practically possible to curb the world's oldest profession with punitive measures. The apex court's remarks came while dealing with a Public Interest Litigation (PIL) filed by an NGO Bachpan Bachao Andolan and the intervention application

²⁹⁹ Section 8 of the ITPA.

³⁰⁰ Section 5(c) of the ITPA.

³⁰¹ <http://www.expressindia.com/latest-news/Major-flaws-in-Immoral-Traffic-Amendment-bill-say-activists/330212/>.

moved by Childline complaining about large scale of child trafficking in the country.³⁰²

"When you say it is the world's oldest profession and when you are not able to curb it by laws, why don't you legalise it? You can then monitor the trade, rehabilitate and provide medical aid to those involved in the trade," a bench of Justices Dalveer Bhandari and A K Patnaik told Solicitor General Gopal Subramaniam.³⁰³

The apex court said that legalising sex trade would be a better option to avoid trafficking of women and said nowhere in the world has the trade been curbed by punitive measures and that the sex trade have been operating in one way or the other and nowhere in the world have they been able to curb it by legislation. Further, in some cases, they are carried out in a sophisticated manner. "So why don't you legalise it?" the apex court said, to which the Solicitor General had agreed to look into the matter.³⁰⁴

Further in July, 2009, Director of the Naz Foundation India Trust, an advocacy group based in New Delhi successfully brought a public interest petition to overturn India's anti-sodomy law under Section 377 of the Indian Penal Code. The Delhi High Court decriminalised gay sex, a move rights activists said would help India combat the spread of HIV/AIDS and encourage those affected by it to come forward and seek treatment and information. According to the Delhi High Court, the colonial-era law was discriminatory and gay sex between consenting adults should not be treated as a crime. Until the High Court ruling, homosexual acts were punishable by a 10-year prison term.³⁰⁵ The High Court said in its ruling that:

"Moral indignation, howsoever strong, is not a valid basis for overriding individuals' fundamental rights of dignity and privacy. In our scheme of things Constitutional

³⁰² <<http://www.indianexpress.com/news/legalise-prostitution-if-you-cant-curb-it/552045/>>.

³⁰³ <http://barandbench.com/brief/2/383/legalizing-prostitution-77-counsels-on-record-supreme-court-asks-solicitor-general-on-governments-view..>

³⁰⁴ Supra Note 308.

³⁰⁵ <<http://www.bbc.co.uk/news/world-asia-india-17054187>>.

*morality must outweigh the argument of public morality, even if it be the majoritarian view,"*³⁰⁶

Pursuant to this decision, there were many arguments raised by activists that since gay sex can be permitted, then prostitution too deserves to be legalised since it could be as much a consensual act between two adults in a private place and that homosexuality and prostitution do have striking parallels in Indian law.³⁰⁷

Over the years, India has seen a growing mandate to legalise prostitution, to avoid exploitation of sex workers and their children by middlemen and in the wake of a growing HIV/AIDS problem. However, to realise such measures in India would certainly require enormous resources not only due to the breadth and length in terms of geography but also due to its vast poverty stricken population.

5.2.2 Singapore

Singapore's approach to prostitution is unique in that this is one of the few countries where there is a sharp divergence between the law and its enforcer. Prostitution in Singapore is not criminalised or in other words is legal. However, prostitution related activities like pimping, public solicitation, keeping or managing a brothel,³⁰⁸ exploitation and control of sex workers and living on the earnings of sex workers are illegal.³⁰⁹ Prostitutes must be registered and carry a yellow card if they wish to work in designated red light areas. Prostitutes should be at least 18 years of age.

In February, 2008 the government enacted amendments to the Penal Code that criminalises prostitution involving a minor under the age of 18.³¹⁰ Recently, in April, 2012, a former Singapore school principal was jailed for nine weeks for having sex with

³⁰⁶ <<http://www.time.com/time/world/article/0,8599,1908406,00.htm>>1.

³⁰⁷ Manoj Mitta, *If gay sex is legal, why not prostitution?*, <http://articles.timesofindia.indiatimes.com/2009-07-11/india/28151381_1_prostitution-gay-clients-first-offence>.

³⁰⁸ Section 148.

³⁰⁹ Section 146.

³¹⁰ Section 376B of the Penal Code.

an underage prostitute, the first of 48 men to be convicted for engaging her services after a massive sting operation was made by the police.³¹¹

The Women's Charter prohibits selling, buying, or obtaining possession of any woman or girl for the purpose of prostitution either inside or outside the country.³¹² Section 159 of the Women's Charter empowers the Director of Social Services to remove a girl under the age of 21 involved in the prostitution trade to a place of safety and to detain her there.

However, under informal arrangement, brothels are allowed to function in designated red-light areas (DRAs) in Geylang, Keong Saik Street, Flanders Square and Desker Road.³¹³ There is an informal agreement between the prostitutes, brothel owners and the Anti-Vice Enforcement Unit (AVEU) who consists of the police unit in-charge of dealing with prostitution. The brothel owners are to ensure that the prostitutes are free from STDs, not below the age of 18,³¹⁴ not exploited and have a 'yellow card'. New prostitutes have to be interviewed by the AVEU to ensure they are working on their own accord. Prostitutes are permitted to work in the brothel if they are medically registered which means that the prostitute has been issued a yellow card akin to a medical card and has her particulars registered with the AVEU. Those with this card have to submit themselves for medical check-up once a fortnight.³¹⁵

This arrangement is beneficial for all the three parties involved. If the brothel owners comply with the regulations laid by the police, they have an opportunity to operate a lucrative business without the hassle from the police. In the case of prostitutes, they have a privilege of working within a DRA then working in the streets, medically

³¹¹ <<http://www.mysinchew.com/node/72974>>.

³¹² Section 140 to 142.

³¹³ Wong Yang Joel, *Brothels, Pimps and Prostitutes: The Administration of criminal justice vis-à-vis prostitution*. 17 Sing LR 1996, 154.

³¹⁴ Jin Hui Ong, "Singapore" in *Prostitution: An international Handbook on Trends, Problems and Policies* (Nanette J Davis ed, 1993) at 248-249.

³¹⁵ *Supra* Note 315 at 170.

registered and have the assurance that the police would not interfere with their work because the AVEU often clamp down the operations of brothels outside the DRA. On the part of the AVEU, they can look after the welfare of the prostitutes as their particulars have been registered and the prostitutes have an avenue to complain to the AVEU if they are mistreated without fear of being caught. The AVEU could proceed with investigation and put pressure on the brothel owners to honour their contracts with the prostitutes.

Singapore has come up with an informal but workable arrangement despite there being no laws decriminalising or legalising prostitution. This certainly indicates that the existing written laws in Singapore are inadequate to deal with the problem that arises from the prostitution trade. Although the existing statute law is ignored by the AVEU, this informal arrangement is seen to benefit all parties involved. It is the writer's opinion that the AVEU should not take matters into their hands as they seem to be operating above the law albeit it is a workable arrangement. The way forward would be to amend the existing law or implement a new law regulating the prostitution trade through the Legislature thus making this informal arrangement legal.

5.2.3 Hong Kong

Prostitution is not illegal in Hong Kong. According to Chapter 200 Crime Ordinance Section 117 Part XII Sexual and related offences interpretation, prostitute means a prostitute of either sex. Under Section 117(3) (b), vice establishment is defined as: *"Premises, vessel or any place shall not be treated as a vice establishment for the purposes of this Part unless the premises, vessel or place are or is used wholly or mainly by two or more persons for the purposes of prostitution; or the premises, vessel or place are or is used wholly or mainly for or in connection with the organizing or arranging of prostitution."*

Based on the above definition, 'One-Woman Brothel' is allowed. As such, most of the sex workers in Hong Kong consist of women working in small, usually one room apartments which are often referred to as 'One girl in one apartment'. All other activities relating to sex work is illegal, such as living on the earning of prostitution,³¹⁶ keeping a vice establishment³¹⁷, managing or assisting in the management of a vice establishment³¹⁸ solicitation in a public place³¹⁹ and advertising.³²⁰

Currently, the main form of sex work in Hong Kong are street girls, one girl in one apartment, karaoke bars, night clubs, massage parlours, saunas and other entertainment outlets. Except for street girls and 'one girl in one apartment', others have an employer or even an employment contract. However, if a sex worker encounters problem, the employers would not help.³²¹

It is the writers opinion that the form of 'one girl one apartment' for sex workers is a better option as it is based on mutual consent and that the sex worker does not have to deal with third parties intervention, thus protecting the sex worker from exploitation and victimisation from pimps or brothel owners.

5.2.4 Turkey

Prostitution in Turkey is legal and regulated.³²² Under Article 227 of the Turkish Penal Code (Law No. 5237), pimping is illegal. Brothels commonly called 'genelev' are legal and licensed under health laws dealing with sexually transmitted infections.³²³ Women need to be registered and acquire an identification card stating the dates of their

³¹⁶ Chapter 200, Crime Ordinance, Section 137.

³¹⁷ Chapter 200, Crime Ordinance, Section 139 (1) (a).

³¹⁸ Chapter 200, Crime Ordinance, Section 139 (1) (b).

³¹⁹ Chapter 200, Crime Ordinance, Section 147.

³²⁰ Chapter 200, Crime Ordinance, Section 147A.

³²¹ <http://www.walnet.org/csis/papers/redefining.html#3f>.

³²² Chi Mgbako and Laura A. Smith, "Sex Work and Human Rights in Africa", 33 Fordham International Law Journal 1178, (2010) at 12.

³²³ <prostitution.procon.org/sourcefiles/newzealandreport.pdf>.

health checks.³²⁴ Only single, Turkish women over the age of 18 may register and registered women cannot marry while registered.³²⁵

It is mandatory for registered prostitutes to undergo regular health checks for sexually transmitted diseases.³²⁶ The police are allowed to check the authenticity of registered prostitutes to ensure whether they have undergone health checks and have been examined properly. Women who choose to register as prostitutes and work in the *genelevs* are assured protection from police intervention and abuse by 'clients'. However, the law places severe constraints upon their personal freedom at all times, although enforcement varies among local police forces.³²⁷

Registered prostitutes are not allowed to work outside a *genelev* and must inform the police if they change premises. They exchange the identity card carried by every ordinary citizen for special ones identifying them as prostitutes. They may later 'renounce' prostitution in order to obtain an ordinary identity card.³²⁸

However, police enforcement varies from place to place. In many large cities the exchange of identity cards is not always required. In Istanbul registered workers can leave the *genelev* to accompany clients to hotels and even live outside it. In other areas, prostitutes are confined to the brothel, perhaps with one day off per week, or only with permission, and must carry permits from the management to show that they are allowed out.³²⁹

Registered women can expect a secure source of income, as there is apparently no shortage of clients in the *genelevs*. However, the *genelev* management takes the

³²⁴ <<http://prostitution.procon.org/view.resource.php?resourceID=000772#turkey>>.

³²⁵ Supra Note 326.

³²⁶ *Ibid.*

³²⁷ Supra Note 325.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

largest share of earnings. The genelev worker receives only 40 to 50 per cent of the set price paid at reception and tips are also shared with management.³³⁰

Most sex workers, however, are unregistered, as local governments have made it a policy not to issue new registrations. As a result, most sex workers in Turkey are not registered sex workers thus working in violation of the law.³³¹

In Istanbul no new prostitutes are registered and even outside Istanbul local authorities no longer monitor suspected prostitutes. This may result from the rise of religious political parties which have made them reluctant to involve themselves with prostitution. In Kurdish towns the police apparently refuse to register women brought to them, or make it easy for them to revert to normal legal status.³³²

Strips clubs are also evident in current Turkey. Strip clubs should also be licensed and strippers must be registered and have regular health check-ups. All persons entering strip clubs must be at least 18 years old.³³³

The Turkey model only allows brothel and does not allow sex workers to work independently unlike the 'one girl in one apartment' concept in Hong Kong. Street prostitution is also not allowed in Turkey which is a good thing as this would only cause public disturbance and an eyesore to other members of the community. However, the sex workers in brothels are not given adequate protection by the police unlike the 'unofficial' model practiced in Singapore where any mistreatment or victimisation against sex workers by brothel owners or management can be brought to the AVEU. The sex workers in registered brothels in Turkey would also have to exchange their identification card for special ones identifying them as prostitutes which would further stigmatise them.

³³⁰ Supra Note 325.

³³¹ <<http://isprostitutionlegal.com/europe/turkey>>.

³³² Supra Note 327.

³³³ Supra 325.

CHAPTER 6

6.0 MODEL FRAMEWORK TO REGULATE THE LEGALISATION OF THE SEX SECTOR IN MALAYSIA

Criminalising prostitution in Malaysia would only drive the prostitutes underground and into a more dependant relationship with pimps thus resulting in greater exploitation of the sex workers. Time, money and resources spent in curbing prostitution might as well be channelled for a better cause to advocate supportive measures that would legalise the sex trade in order to assuage the perils of exploitation by vice syndicates, harassments by unscrupulous enforcement officials, stigmatisation by society and also, both physical and emotional ill-treatment by sadistic clients.

On the other hand, even if the sex sector in Malaysia is decriminalised, it would not solve the quandary of the sex workers to seek protection for their rights. The absence of any laws to regulate this industry will lead to various interpretations of the rights of sex workers by various sect of society. In fact, the sex workers and those associated with this industry may abuse this new found liberty under decriminalisation, if left unchecked, as they may think that decriminalisation gives them a free pass to conduct the business in any manner they wish with disregard to the interest of the society at large. So, decriminalisation without appropriate laws to regulate this industry will definitely lead to a legal quagmire.

Therefore, it is the writer's opinion that legalising prostitution in Malaysia would certainly be a better option than Criminalisation or Decriminalisation. Legalising prostitution in Malaysia would ensure better health-care services for sex workers and increased protection for sex workers against unsafe work conditions, human trafficking and violence.

Legalising is a pragmatic approach recognising the fact that it is virtually impossible to totally wipe out prostitution. However, through this approach, it can create a climate in which policies can be discussed in a transparent and inclusive manner benefiting all strata of an ever-evolving society.

Hence the thrust of this policy is containment and not elimination taking into consideration that even if prostitution is illegal in certain countries, for example Thailand, yet prostitution continues to thrive with the government turning a blind eye to this sector. In fact, it could be argued that because of the sex industry in Thailand, their tourism industry has flourished over the years.

There may be arguments from by various opponents that the approach to legalise prostitution may be quixotic and would rather lead to an increase in the number of sex workers. In the contrary, the experience in New Zealand proved that nationwide legalisation in 2003 has not increased the number of prostitutes in the country.³³⁴ Also, documented increases in the number of sex workers and customers in other legal system may or may not be traceable to legalisation per se, since it is impossible to know if the amount of prostitution would have increased anyway, without legalisation.³³⁵

The legal principle on which legalisation of prostitution rests is that criminal laws should not interfere with the conduct of consenting adults as long as it doesn't interfere with the legal interest of others. Legalising prostitution in Malaysia in an organised way would be superior in comparison to a blanket criminalisation. However, this would very much depend on the specific laws and regulations underpinning the sex industry. The regulations needed would shape the extent of the government's involvement, benefits to the sex industry, safeguarding public order and help resolve social problems that existed prior to legalisation.

³³⁴ Prostitution Law Review Committee, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, Wellington, New Zealand: Ministry of Justice, 2008.

³³⁵ *Supra* Note 230, at 84.

6.1 BEST POLICY TO BE ADOPTED BY MALAYSIA

The writer proposes that prostitution should be legalised, but regulated in Malaysia. In line with legalising, the writer envisage a law termed as Malaysia's Sex Industry Regulation and Licensing Act need to be enacted and shall be based on the framework as set forth below.

6.1.1 Regulation and Licensing

Although, prostitution is legal there must be a regulation aimed at keeping prostitution discreet and out of sight so as to avoid public from being exposed and to ensure that prostitution trade is kept at a low profile. Many prostitutes solicit or loiter for the purpose of prostitution on the streets usually in capital cities. Street soliciting happens in public areas.

These activities could be ceased by regulating prostitutes to work in designated Red Light Districts (RLD) that shall be located away from schools, places of worship, residential areas or in other words from public view. Given the relative isolation of this type of RLDs, the sex workers would not be visible to a larger proportion of the general public with far less pedestrians and cars trolling through the area. This shall be one of the primary condition and this areas shall be administered by the local government.

The local government's role would be to confine sex work to a specific RLD and remove it from other parts of the city, to reduce illegal brothels and the likes and to provide regulations to safe and hygiene working conditions for the sex workers.

Local governments are to be given the task to regulate the RLDs and also the power to withhold or revoke permits for businesses in the event the brothel owners, building owners or entertainment owners in the RLD are suspected of criminal wrongdoings.

This sex related businesses should be licensed just like any other business. This applies to building owners, brothel owners, massage parlours, pubs & entertainment outlets within the RLD. License or businesses within the RLDs should be displayed on the premises for clients to know that the business is legal.

The regulations imposed on the whole should not be extensive, expensive and stigmatising, and the costs should be comparable to other service industries failing which, there would be a temptation to opt out of the RLDs and operate illegally.

Indoor prostitution should be allowed in these RLDs where the sex worker rents a room from building owners & may share the room with another sex worker working on different shifts like the 'one girl one apartment' concept in Hong Kong. Building owners may rent individual rooms for a rate mutually agreed such like the hotel brothels in Germany. While the buildings in the RLDs themselves are obvious centres of sexual commerce, the workers and clients are not visible from the street as street walkers are not allowed within the RLDs.

Indoor work by one or two prostitutes is seen as a more preferable work compared to street walkers or in brothels since it gives the workers maximum autonomy and shields them against exploitation by pimps and brothel owners as compared to street prostitution. There is relatively little public opposition to indoor prostitution as long as it remains discreet. It is the writer's opinion that the public would not be bothered by indoor prostitution as oppose to street prostitution.

6.1.2 Brothels are allowed to operate within the RLDs.

Brothels should only be allowed within RLDs and away from the public view. Brothels owners have to apply to the local council for a permit to run a brothel. Criteria for permits should be spelled out in clear terms in the proposed legislation.

Brothels should also be prohibited from displaying indecent signage conforming to local authority requirements. Brothel owners should be screened by the local government to ensure they do not have past criminal records involving drugs, coercion or violence. A conviction for such crimes should be grounds for denial of a license. Malaysia can adopt the basic idea from the informal workable arrangement in Singapore without its pitfalls.

The brothel owners are to ensure that the sex workers are free from STDs, not below the age of 21, not exploited and shall be registered with the police. Sex workers are permitted to work in the brothel only if they have undergone regular health screening by approved medical practitioners and are issued a clean bill of health. This is registered in a special card to be issued to all sex workers that would prove that they have undergone and passed such medical examination. This card shall be carried with them at all times within the RLDs and shall be produced upon request by police, brothel owners, building owners and customers.

This arrangement is beneficial for all parties involved in the sex business. If the brothel owners comply with the regulations laid by the police, they have an opportunity to operate a lucrative business without the hassle from the police. In the case of prostitutes, they have a privilege working within the RLDs than working in the streets, medically registered and have the assurance that the police would not harass them.

Thus, sex workers have options whether to work in a brothel or rent rooms within the RLDs without any intervention by third parties.

6.1.3 Preserving public order and decency.

There should be a police station in the centre of the RLDs. A special task police unit in-charge of dealing with prostitution at the stations in the RLDs should be

established. They shall comprise of specially trained policeman and police women and shall abide by a strict code of conduct to prevent any misconduct.

Sex workers within the RLDs should be registered with the police station at each of the RLDs. This would increase the sense of legitimacy and the sense of community within the sex workers and is correlated with much lower level of depression and mental stress³³⁶ and the sex workers would also be free from police harassment.

The police are also authorised to question individuals who loiter and are suspected of being pimps and monitor signs of exploitation of trafficking and minors. New sex workers have to be interviewed by the police stationed at the RLDs to ensure they are working without coercion. The relevance of the police is mainly to provide safeguards for the protection of sex workers against exploitation.

The police are also empowered to look after the welfare of the sex workers as their particulars have been registered. They also have an avenue to complain to the police located within the RLDs if they are mistreated without fear of being caught. Upon receipt of complaints, the police must proceed with investigation and put pressure on the brothel owners to honour their contracts with the prostitutes or charge the brothels under the prevailing laws.

Local government or special police task unit could meet with the building owners, brothel owners & sex workers twice a year informing them of any new policy and asking the parties for input in improving the RLDs. Representatives from the local government should conduct periodic checks on sex businesses within the RLDs to ensure that businesses are complying with the rules and regulations.

³³⁶ Yasmina Katsulis, *Sex Work and the City: The Social Geography of Health and Safety in Tijuana, Mexico*, Austin: University of Texas Press, 2008, at 77.

6.1.4 Preventing exploitation and corruption of the young.

The minimum age for sex workers shall be 21. All sex workers should be registered with the police and carry identification card verifying their details which include the status of their health checks. Customers are allowed to check this card before buying sex. Sex workers caught within the RLDs without the card shall be subject to punitive fines. Public below the age of 21 are prohibited from entering the RLDs.

The police can ensure by way of interview that a sex worker enters into prostitution solely on her own free-will and is not victim of pimps or human trafficking before allowing her to register.

The Act regulating and licensing the prostitution could also create a hotline through which clients and sex workers can anonymously report to the police suspected abuse of another sex worker. This type of hotline exists in Netherlands today.

6.1.5 Healthcare: prevention of AIDS and Sexual Transmitted Diseases

Sex workers also need to have mandatory health check-ups once a fortnight to assure that they are not infected by AIDS and STDs. Their health records would be entered into their registration card for easy monitoring by the police. In addition to health tests, condom use is also mandatory for all forms of sexual encounters. In United States, the rate of infection of legal prostitutes in Nevada from AIDS and other STDs has been zero because of mandatory condom usage.³³⁷

Those who are found to have STDs would be de-registered until they have recuperated and do not pose a health risk.

³³⁷ Coty R. Miller, Nuria Haltiwanger, "Prostitution and the Legalization /Decriminalization Debate", The Georgetown Journal of Gender and the Law, Vol.V:207, at page 239.

6.1.10 There should also be a government health clinic in each of the RLDs, which offers sex workers anonymous and free psychological counselling, tests and treatment for sexually transmitted diseases and support for those who wish to leave the trade.

6.1.6 Soliciting is allowed within the RLDs.

Soliciting should be allowed only within the designated RLDs. However, there should be a code of decency to be complied by the sex workers within the RLDs. For example, outside any premises, in public view, sex workers should not be indecently dressed while soliciting.

6.1.7 The setting up of a Prostitution Law Review Committee (PLRC)

This committee should be given the task to review prostitution related laws and policies and their implementation and rectify any problems identified in the review. Any new laws or policies should be deliberated amongst various stakeholders including government officials, brothel owners, building owners, the public and the sex workers themselves akin to the New Zealand's Prostitution Law Review Committee.

6.1.8 Payment of tax

Tax payment should not be retrospective. The tax collected should be used to cover the costs of administrating and regulating these RLDs by the government. Special business taxes or licensing fee can be imposed on entertainment establishments such as massage parlours, pubs and restaurants.

6.1.9 Right to form Association

All sex workers are entitled the right to form association subject to the approval of the Registrar of Societies. By having an association of their own, sex workers would certainly have an avenue to channel their grievances and get help for any problems faced by them.

6.1.10 Right to insurance Penal Code (Art 374)

Sex workers in these RLDs shall also be entitled to life insurance from the state or from a private insurance or bank to be arranged by the local government. The best example would be India.³³⁸

In 2008, approximately 250 sex workers in India's eastern city of Kolkata have, for the first time received life insurance cover from a State-owned corporation, Life Insurance Corporation (LIC) of India. Prostitutes say it is a breakthrough in their efforts to get legal recognition for their work.³³⁹

The insurance policies, which are now expected to include sex workers outside Kolkata, are not the only advancement for women in the world's oldest profession.

In the western port city of Mumbai, a bank run by sex workers was established some years ago to help free them from exploitative brothel owners who maltreated them and kept them in wretched conditions. Started by a handful of sex workers in Kamathipura, Mumbai's red light district, it now has hundreds of clients.

6.2 AMENDMENTS TO OTHER EXISTING LAWS

Other existing laws should be amended in line with the proposed Sex Worker's Regulation and Licensing Act as discussed above. Once prostitution has been legalised in a designated area, sex workers should also be entitled to the rights as bestowed to other workers in Malaysia to ensure that they are also protected equally in accordance to the law.

³³⁸ <<http://www.telegraph.co.uk/news/newstoppers/howaboutthat/1917672/Indian-prostitutes-receive-life-insurance.html>>

³³⁹ <<http://www.reuters.com/article/2008/04/30/us-india-sexworkers-idUSDEL26074320080430>>.

6.2.1 Amendments to the Penal Code (Act 574)

Section 372A(1), 372B and Section 373 of the Penal Code which comprises of persons living on or trading in prostitution, soliciting for purpose of prostitution and suppression of brothels should be amended taking into account the proposed Red Light Districts under the model framework as discussed earlier.

The writer contends that Section 372A (1) should be amended to include a proviso to allow sex workers to share part of their earnings with third parties within the RLDs without any coercion. However, section 372A (2) shall remain unchanged.

Unnatural offences under section 377 to Section 377E should remain unchanged. It is pertinent to emphasize here that in this study, prostitution is only confined to sexual intercourse between the opposite sexes.

6.2.2 Amendments to the Employment Act 1955 (Act 265)

The definition of 'employee' under the Employment Act (EA) means "*any person or class of persons*

(a) Included in any category in the First Schedule to the extent specified therein or

(b) In respect of when the Minister makes an order under subsection (3) or section 2A.

The First Schedule under Section 2 (1) of the EA sets out certain limitations and categories of employees that are covered under the EA. The First Schedule under section 2 (1) of the EA should be amended to insert sex workers as well.

By amending the EA to include sex workers working within the RLDs, sex workers who are employed by the brothel owners under a contract of service would come under the purview of the EA, thus enabling the sex workers to enjoy the same rights as any other workers in Malaysia

These rights include right to wages, right to overtime work, right to termination and lay-off benefits, right to maternity protection, right to annual leave and sick leave and right to make a complain to the Labour Department in the event the brothel owners do not adhere to the minimum standards of protection as envisaged in the EA.

6.2.3 Amendments to the Industrial Relations Act, 1967 (IRA)

The definition of “Workman” under the IRA should also be amended to include sex workers working within the RLDs. This would enable the sex workers under the contract of employment with the brothel owners to bring an action against the brothel owners for any unfair dismissal.

6.2.4 Amendments to the Employees Provident Fund Act, 1991 (Act 452)

The definition of “Employee” under the EPF Act should also be amended to include sex workers working within the RLDs. This would enable the sex workers to contribute to EPF as their retirement savings, entitled to dividends every year and as a tax incentive as well.

6.3 REGISTRATION OF SEX WORKERS WITH THE POLICE: SHOULD IT BE ALLOWED?

Finally, in countries where prostitution is legal for instance in Netherlands, sex workers and brothel owners are opposing the need to register sex workers and describe it as ridiculous and unnecessary and that there is no need to have a separate registration for prostitutes.³⁴⁰

Malaysia has adopted the Personal Data Protection Act 2010, which regulates the processing of personal data concerning individuals. Datuk Seri Dr Rais Yatim, the Minister of Information, Communication and Culture recently said that the government

³⁴⁰ Supra Note 230, at 156.

of Malaysia will be implementing the Personal Data Protection Act (PDPA) this year.³⁴¹ However, even if it does materialise, the PDPA does not apply to the federal and state governments. As such, since under the proposed framework, registration is to be carried out by the police which comes under the federal government, therefore the provisions under the PDPA would not apply.

The contentions by the sex workers and brothel owners in Netherlands should not be a concern for the sex workers in Malaysia as the Malaysian framework to legalise prostitution as proposed would benefit them more than cause them any harm.

The purpose of registration of sex workers is to differentiate the legal and illegal sex workers and to allow them free health screening from the health clinic as well as to ensure that they are protected by the police within the RLDs. The registration card is only required to be carried within the RLDs. Since outside the RLDs they are not required to do so, the issue as to stigmatisation would not arise.

³⁴¹ <http://www.law.com.my/2012/02/government-ready-to-implement-the-personal-data-protection-act-this-year/>.

7.0 CHALLENGES IN LEGALISING PROSTITUTION IN MALAYSIA

Although no policies can be problem-free, the proposals set forth in Chapter 6 suggest that prostitution can be organised in a way beneficial to all parties. However, in the aftermath of legalising prostitution, there is naturally a period of adjustments by the interested parties and often some amendments to the regulations may be needed to address unexpected teething problems. Competing interest from various parties would also make the post legalisation period precarious and unpredictable which may result in changes in the original intent of law reform initially thought to be comprehensive and complete.

It must be recognised that no matter how advantages the arguments for law reforms are, there are other constraints and challenges against these reforms. In this last chapter, the writer wishes to discuss the challenges that are envisaged in legalising prostitution in Malaysia before offering a conclusive statement.

7.1 CULTURAL AND MORAL BELIEFS

In the Malaysian context, any law reforms usually face vehement opposition if it goes against the very principles of our moral belief which is inter-twined and deeply rooted within religious precepts. In fact, for the most part of it, if not all, religious edicts or precepts shapes and dictates our moral values and social norms. Every act of a person be it from marriage to business, is scrutinized using this religious microscope and accordingly, all laws enacted will be founded on this perception.

Therefore, the first and foremost challenge against law reforms to legalise prostitution would be to convince legislatures to take their religious caps off and in lieu,

put on a liberal mind-set to accept that sex workers too have the fundamental right to livelihood as enshrined in the Constitution.

It must be borne in mind that the main purpose of legalising prostitution is to eliminate stigma and victimisation suffered by the sex workers by shifting the view of prostitution from an immoral practice to a dignified work, worthy of protection from both violence and disease and to ensure that the sex workers are entitled to all rights bestowed on other occupation equally and that culture and religion of a particular person or sex worker is of no relevance here. It is the writer's opinion that sex workers irrespective of whatever creed, race and religion should come within the purview of the legal framework as proposed in Chapter 6.

Religion and moral beliefs of the majority should not be the concern of a legislator when drafting a law to protect the needs of a particular group of minority. Practically, all religious and cultural beliefs in Malaysia prohibit the sale of sex and commands that its believers strictly follow a life of fidelity. In fact, Abrahamic religions such as Judaism and Islam demands any adulterous conduct be subject to punitive punishments – under Judaism, any adulterer shall be stoned to death.

However, in recent times, moderate Islamic countries adopted the path of legalisation rather than criminalisation in dealing with this oldest profession on earth by recognising the sex industry as a legitimate employment. One such example, as discussed in Chapter 6 is Turkey where prostitution has been legalised and regulated.

In the world's largest Muslim country i.e. Indonesia, there is no laws that prohibits prostitution.³⁴² Since prohibition of commercial sale of sexual services does not exist in the national law, the regulation of the sex sector tends to be based on provincial or sub-district government regulations as well as the actions and pressures of

³⁴² Supra Note 19, at 57

various social groups in support or in opposition to the sex sector.³⁴³ The local government regulations differ from one province to another.

Indonesia has a form of quasi-legalised prostitution in official brothel complexes. This form is based on the reasoning that prostitution cannot be wiped out in totality and that it needs to be controlled in the interest of public order and safety. Brothels are subject to rules and regulations and the regulators consist of regional administrators, local prosecutor, police chief and military commander.³⁴⁴ Local government authorities gain substantial revenue from the prostitution complexes.³⁴⁵

Within our shores, this liberal approach has been adopted towards certain acts that are prohibited under Islamic Law. One such act is gambling. This is not a novel idea to Malaysia as Genting Highlands has been designated as a legal gambling area despite having laws prohibiting it. Therefore, it may be argued that the sex sector can be legalised for non-Muslims in the same way as gambling is legal in Malaysia for non-Muslims provided it is licensed but not for Muslims.

In 2010, Information, Communications and Culture minister Datuk Seri Dr Rais Yatim told journalists that he supports legalised sports betting and gambling provided it is governed by proper laws and regulations.³⁴⁶ He said that instead of allowing a black market to flourish, reported to be a RM10 billion per annum, licensed sports betting if well-regulated will discourage illegal gambling activities. Dr Rais also said that legalising football betting was not something new compared to horse betting and number forecasting.

³⁴³ Supra Note 19, at 59.

³⁴⁴ *Id* at 60.

³⁴⁵ *Id* at 61.

³⁴⁶ Lester Kong, "Have legalised Sports betting, says Rais", *The Star Online*, 23 June 2010. <<http://thestar.com.my/news/story.asp?file=/2010/6/23/nation/20100623143040&sec=nation>>.

He further re-iterated that there should not be any discrimination and that Malaysia need to be objective and recognise the social rights of non-Muslims as well and that special escrow account held by a non-governmental broker should be set up into which taxes collected from sports betting could be channelled and used for the welfare of needy non-Muslims and that Muslims do not have to touch it.

He believed that sports betting should come under a commission and that Malaysian government must consider the best practices and mechanisms that are fair and just, instead of just giving a licence. He also indirectly urged his UMNO colleagues to look at sports betting objectively, not emotionally.

Former Prime Minister Datuk Seri Dr Mahathir Mohamad also said that he did not see the need to restrict people from indulging in activities not barred by their religions.³⁴⁷ He went on to say that “We do not ban people from eating certain meats just because Muslims are barred by religion from eating them. So why should we restrict people from doing other things that are not against their religion? If I were still in the Government, I would approve the license for sports betting”.

The above clearly shows that Muslims in Malaysia may be open to adopt a tolerant approach to legalise non-Muslims practices that may be against Islam save for the fact that it does not include Muslims. This could also be considered a pragmatic approach taken to legalise prostitution in Malaysia.

However, in this instance, the writer is of the opinion that the legalisation should also include Muslims as well. This is because the exclusion would only cause the large

³⁴⁷Lester Kong, “Rais: Allow Sports betting,” *The Star Online*, 24 Jun 1020 <<http://thestar.com.my/news/story.asp?file=/2010/6/24/nation/6536584&sec=nation>>.

number of Muslims working in the sex sector to continue as an illegal group; thereby defeating the purpose of legalisation.³⁴⁸

7.2 POLITICS

The second hurdle to legalise prostitution would be the fact that legislatures are politicians and in order to maintain a long and lustrous political career, politicians are rather drawn to support populous demands or reforms. Sex workers, though, involved in a lucrative industry are a minute minority that would not provide any political mileage.

In fact, politicians supporting sex workers, in Malaysia, would be seen in a negative light by the majority of the society and this would tantamount to political suicide. Hence almost all politicians tend to distant themselves from being supportive of legalising prostitution for fear of being rejected by the voters. What is needed to push through law reforms relating to prostitution is the careful explanation to the public of the issues and the problems involved in the current system in order to open the public's eye from a prejudicial mind set.

However, the issue of prostitution, by far, would be one of the most controversial reforms to be undertaken by the Malaysian legislators and would certainly be a real test of grits in terms of political will for the government. This lack of political will must first be overcome to realise the legalisation of prostitution. For without such strong will, the dissenting voices against legalisation would surely drown any efforts to uphold the fundamental liberties for the sex workers albeit guaranteed in the Constitution, equally for all.

³⁴⁸ Supra Note 8, at 102.

7.3 PARADIGM SHIFT

In 1962, Thomas Kuhn wrote *The Structure of Scientific Revolution* wherein he defines paradigm shift as a "series of peaceful interludes punctuated by intellectually violent revolutions", and in those revolutions "one conceptual world view is replaced by another". Paradigm Shift is a change from one way of thinking to another. It is a revolution, a transformation, a sort of metamorphosis. It just does not happen, but rather it is driven by agents of change. In the context of the Malaysian legal system, paradigm shift is also not a novel idea.

In 1957, the Constitution of Malaysia provided Malay Rulers immunity from civil action or criminal prosecution. Article 32 provided that the King "*shall not be liable to any proceedings whatsoever in any court*" and Article 181(2) provided that "*no proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity.*" All this changed in 1993 when a Special Court was created under Article 181(2) and 182 of the Federal Constitution to try all cases by or against the Yang Di-Pertuan Agong and the Rulers. Thus, what was once thought to be impermissible in law has now been allowed.

In a similar fashion, when dealing with the legalisation of prostitution in Malaysia, a paradigm shift towards prostitution as a legitimate profession guaranteed by the Federal Constitution would certainly take a painstakingly gradual process. However, this could be possible by way of education and the awareness among the public that the rights guaranteed by the Federal Constitution extends to sex workers as well.

7.4 CONCLUSION

The sex workers³⁴⁹ in Malaysia have the right to livelihood, right to choose their profession, right to be accorded with dignity, right to equality before the law, right to equal protection of law, right to form association and right to dispute any forced labour. These rights are guaranteed by the Federal Constitution and to deprive these rights would make the fundamental rights guaranteed by the constitution an ineffective or illusory piece of document. In spite of the challenges in legalising prostitution as discussed earlier, these challenges should not be an obstacle to prevent the sex workers from their rights as guaranteed by the constitution. No laws based on morality or political view can take away the rights conferred by the Federal Constitution from the sex workers. Parliament cannot enact law which are inconsistent with the rights as guaranteed by the Federal Constitution.

Furthermore, although our laws criminalise prostitution, it continues to thrive in our midst. In fact, nations with more stringent laws against prostitution have failed to wipe out the illegal sale of sex and exploitation of sex workers in totality. So, the most feasible and viable alternative would be to legalise and regulate the industry that would accord sex workers the gravely needed protection against exploitation while recognising their rights guaranteed by the Federal Constitution.

Legalising prostitution would confer the right to sex workers to choose if they would want to continue in the sex trade or not, without any coercion from third parties. Thus, legalising prostitution safeguards the welfare of the prostitutes in terms of their rights, protection and equality as workers. By ensuring that the rights guaranteed by the Federal Constitution are accorded to the sex workers, the socio-economic rights of the sex workers would also be protected.

³⁴⁹ The same protection should also be accorded to male sex workers.

We also cannot deny the fact that major contents of laws are derived from morality regardless from whence it stems from, be it from religion or accepted social norms. But if the sex trade is legalised, a conundrum would exist between the law and morality. However, moral indignation, however strong, should not be used as the basis to override or impinge on the rights guaranteed by the Federal Constitution including the right to free choice of employment for sex workers. Laws legalising prostitution should be carefully designed to fall back on the Federal Constitution. Hence the sex workers would then be guaranteed the right to conduct their business just like any other legitimate business with dignity.

The suggested model framework in chapter 6 also centralises and bounds the sex trade within the RLDs that would be easier for implementation and enforcement of regulations. Legislation would merely be a toothless tiger without adequate and effective enforcement of the regulation of the sex industry. Confinement would provide a more effective way to control the illegal sex trade where enforcement resources can be focused on specific area. Of course one may ask the question what would prohibit illegal sex from thriving outside the RLDs. The answer lies in the fact that convenience and freedom to do business without encumbrances would attract demand into a particular area just like most businesses are centred around major cities like KL, Penang or Johor Bahru for the reason that the infrastructures in these cities provides amenities and facilities that create an easier way to do business than other less developed cities in Malaysia. This in turn encourages migration of people from less developed areas to these cities to find better career opportunities. Likewise, sex workers would naturally be prompted to relocate their businesses in RLDs rather than to operate outside RLDs while customers seeking sexual services would also tend to congregate in RLDs as they need not fear being caught by the police.

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